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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 129

**GENERAL AMERICAN TANK CAR CORPORATION,
PETITIONER,**

vs.

EL DORADO TERMINAL COMPANY

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT**

PETITION FOR CERTIORARI FILED JUNE 22, 1939.

CERTIORARI GRANTED OCTOBER 9, 1939.



No. 8799

United States
Circuit Court of Appeals
For the Ninth Circuit.

**EL DORADO TERMINAL COMPANY, a cor-
poration,**

Appellant,

vs.

**GENERAL AMERICAN TANK CAR COR-
PORATION, a corporation,**

Appellee.

Transcript of Record

**Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division.**

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 129

GENERAL AMERICAN TANK CAR CORPORATION,
PETITIONER,

vs.

EL DORADO TERMINAL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT

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Attorneys for Defendant and Appellee.

**In the Superior Court of the State of California in
and for the City and County of San Francisco.**

Nos. 259305-19929-L

**EL DORADO TERMINAL COMPANY, a cor-
poration,**

Plaintiff,

vs.

**GENERAL AMERICAN TANK CAR COR-
PORATION, a corporation,**

Defendant.

COMPLAINT.

Plaintiff complains of defendant and alleges for a

First Cause of Action

I.

**That plaintiff, El Dorado Terminal Company is a
corporation duly organized and existing under the
laws of the State of California.**

II.

That defendant General American Tank Car Corporation is a corporation organized under the laws of the State of West Virginia and is doing and transacting business in the State of California.

III.

That between the first day of November, 1934 and the 31st day of May, 1935, defendant became indebted to plaintiff for money had and received to the use of plaintiff in the sum of Eighteen Thousand Five Hundred Eighty and 88/100 Dollars (\$18,580.88). Defendant promised to pay said sum to plaintiff, and plaintiff has demanded payment thereof, but no part thereof has been paid, and the whole of said amount is due and unpaid.

Second Cause of Action

For a separate and second cause of action, plaintiff alleges: [1*]

I.

Plaintiff here refers to paragraphs I and II of the first cause of action, and adopts the same, and by such reference incorporates the same herein.

II.

That within two years last past, and prior to the first day of November, 1934, defendant became indebted to El Dorado Oil Works for money had and received for the use of said El Dorado Oil Works, in the sum of Fifteen Hundred Fifty and

*Page numbering appearing at the foot of page of original, certified Transcript of Record.

16/100 Dollars (\$1550.16). Defendant promised to pay said sum to El Dorado Oil Works, and El Dorado Oil Works demanded payment thereof, but no part thereof has been paid, and the whole of said amount is due and unpaid. That El Dorado Oil Works heretofore assigned to plaintiff, its said claim against defendant in the said sum of Fifteen Hundred Fifty and 16/100 Dollars (\$1550.16), and plaintiff is now the owner and holder of said claim, and as such has demanded payment thereof from defendant, but defendant has failed and refused to pay the said sum or any part thereof.

Third Cause of Action

For a separate and third cause of action, plaintiff alleges:

I.

Plaintiff here refers to paragraphs I and II of the first cause of action, and adopts the same, and by such reference incorporates the same herein.

II.

That on or about September 28, 1933, defendant entered into a contract in writing with El Dorado Oil Works by the terms of which the defendant leased and let unto the said El Dorado Oil Works fifty (50) steel tank cars therein referred [2] to as "permanent cars," and such additional steel tank cars as the said El Dorado Oil Works should require during a period of three years from the 1st day of January, 1933 in the conduct of its business, and

said El Dorado Oil Works further agreed not to hire or use any tank cars except those belonging to defendant, and to pay to defendant for the use of said permanent cars the sum of Twenty-seven and 50/100 Dollars (\$27.50) per car per month, and to pay for the use of such additional cars so furnished by the defendant, at the rate of Thirty Dollars (\$30.00) per car per month for the time such cars were in the service of the El Dorado Oil Works; all of said cars were to be so delivered by the defendant to the said El Dorado Oil Works at San Francisco Bay points, and to be kept in good order, condition and repair by the said defendant, and upon the expiration of said agreement to be returned by the said El Dorado Oil Works to the said defendant at Berkeley or Oakland, in the State of California. In said contract defendant also agreed to collect from the railroads over the lines of which said cars were operated and employed, all mileage earned by the said cars; and on the 25th day of each month to credit all mileage earned by said cars or so collected against the rentals then due to defendant for the use of said cars for the previous month, and to pay over to the said El Dorado Oil Works any excess mileage earnings over and above said rental and service charges then found to be due from the said oil works to the defendant. The said El Dorado Oil Works also agreed that the empty mileage haul of said cars should never exceed the full mileage haul thereof, and that at the expiration of said contract, if the empty mileage haul of

said cars on any railroad should exceed the loaded mileage haul thereon, the said El Dorado Oil Works would pay such excess of empty mileage at the [3] rates established by the tariffs of the respective railroad lines. The said El Dorado Oil Works received and operated said tank cars, and paid the rental thereon up to and including the 31st day of October, 1934, and during said period kept and performed all the terms and conditions of said contract on its part to be performed.

III.

That plaintiff is a wholly owned subsidiary of said El Dorado Oil Works, and in and by the said agreement of September 28, 1933, it was provided and agreed that all the rights and benefits thereof should pertain to and be enjoyed by any company affiliated with, or a subsidiary of, the said El Dorado Oil Works; and on or about October 31, 1934, said El Dorado Oil Works assigned all its right, title and interest in said agreement, and in the cars therein referred to, to the plaintiff, and plaintiff undertook to carry out and perform the said agreement. That defendant consented to said assignment as in said agreement provided. That ever since the first day of November, 1934, plaintiff has carried out and performed all the undertakings, terms and conditions of said agreement on the part of said El Dorado Oil Works to be kept or performed, and has employed and used the said tank cars for the purposes provided in said agreement, and has paid

the rental and service charges thereon as in said agreement provided. During said period and up to the 31st day of May, 1933, defendant has collected and received from the railroad companies over the trackage of which the said cars were operated and employed, Eighteen Thousand Five Hundred Eighty and 88/100 Dollars (\$18,580.88), in excess of the sums payable as rentals, or to be credited to the said defendant under the terms of the said contract. That plaintiff has demanded payment of said sum but [4] defendant has failed and refused to pay the same or any part thereof, and still retains the same and the whole thereof.

Fourth Cause of Action

For a fourth and separate cause of action, plaintiff alleges:

I.

Plaintiff here refers to paragraphs I and II of the third cause of action, and by such reference incorporates them herein and adopts the same with the same effect as though set forth at length herein.

II.

That from and after the 1st day of January, 1934 to and including the 31st day of October, 1934, defendant had collected and received from the railroad companies over trackage of which the said tank cars were operated and employed, the sum of Fifteen Hundred Fifty and 16/100 Dollars (\$1550.16) in excess of the sums payable or to be credited by

El Dorado Oil Works to the said defendant under the terms of said contract. That El Dorado Oil Works demanded payment of said sum, but defendant failed and refused to pay the same or any part thereof, and still retains the same and the whole thereof. That prior to the commencement of this action El Dorado Oil Works assigned to plaintiff its claim against defendant for the said sum of Fifteen Hundred Fifty and 16/100 Dollars (\$1550.16), and plaintiff is now the owner and holder of said claim, and as such has demanded payment thereof from defendant, but defendant has failed and refused to pay said sum or any part thereof.

Fifth Cause of Action

And for a fifth and separate cause of action plaintiff alleges: [5]

I.

Plaintiff here refers to paragraphs I and II of the first cause of action, and adopts the same, and by such reference incorporates the same herein.

II.

That within four years last past, defendant became indebted to plaintiff for balance due on a mutual open and current account for money had and received for the use of plaintiff, the sum of Eighteen Thousand Five Hundred Eighty and 88/100 Dollars (\$18,580.88). That plaintiff has demanded payment of said sum but defendant has failed and refused to pay the same or any part

thereof, and the whole thereof is now due and unpaid.

Sixth Cause of Action

And for a sixth and separate cause of action, plaintiff alleges:

I.

Plaintiff here refers to paragraphs I and II of the first cause of action and adopts the same, and by such reference incorporates the same herein.

II.

That within four years last past defendant became indebted to El Dorado Oil Works, for a balance due on a mutual open current account for money had and received for the use of El Dorado Oil Works, the sum of Fifteen Hundred Fifty and 16/100 Dollars (\$1550.16). That El Dorado Oil Works demanded payment of said sum but defendant has failed and refused to pay the same or any part thereof, and the whole thereof is now due and unpaid. That heretofore, El Dorado Oil Works assigned to plaintiff said claim against defendant for the sum of Fifteen Hundred Fifty and 16/100 Dollars (\$1550.16); and plaintiff is now the owner and holder of said claim and as such has demanded payment thereof from defendant [6] but defendant has failed and refused to pay said sum or any part thereof.

Wherefore, plaintiff prays judgment against said defendant for the sum of Twenty-one Thousand One Hundred Thirty-one and 04/100 Dollars (\$21,131.-

04), with interest thereon from the date that each monthly installment thereon became due, and for costs of this suit.

WILLIAMSON & WALLACE,
Attorneys for Plaintiff. [7]

State of California

City and County of San Francisco.—ss.

S. M. Haslett, being first duly sworn, deposes and says:

That he is an officer, to-wit, the Secretary of the El Dorado Terminal Company, the plaintiff in the above entitled action, and as such officer of such corporation deponent is authorized to act for it herein and make this verification on its behalf. That he has read the foregoing Complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters he believes it to be true.

S. M. HASLETT.

Subscribed and Sworn to before me, this 19th day of June, 1935.

[Seal] **AMY B. TOWNSEND,**

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed in State Court, Jun. 19, 1935.
H. I. Mulcrevy, Clerk by C. P. Winter, Deputy Clerk. Filed in U. S. District Court, August 12, 1935. Walter B. Maling, Clerk by J. P. Welsh, Deputy Clerk. [8]

[Title of Superior Court and Cause.]

ORDER OF REMOVAL.

The defendant, General American Tank Car Corporation, a corporation, having filed within the time provided by law its petition for the removal of this cause to the Southern Division of the United States District Court for the Northern District of California, and having at the same time offered its bond in the sum of One Thousand Dollars (1,000.00) with the Indemnity Insurance Company of North America, a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, good and sufficient surety conditioned according to law, and it being shown to the Court that the notice required by law of the filing of said bond and petition had, prior to the filing of said petition, been served upon the plaintiff herein, which notice the Court finds was sufficient and in accordance with the requirements of the law, this Court does now hereby accept and approve said bond and said petition, and does order this cause to be removed to the Southern Division of the United States District Court for the Northern District of California, pursuant to the statute of the United States, and that all other proceedings of this Court be stayed.

Dated: July 18th, 1935.

T. I. FITZPATRICK,

Judge of the Superior Court.

[Endorsed]: Filed in Superior Court, July 18, 1935. Filed in U. S. District Court, August 12, 1935.

In the Southern Division of the United States District Court for the Northern District of California.

No. 19929-L

EL DORADO TERMINAL COMPANY, a corporation,

Plaintiff,

vs.

GENERAL AMERICAN TANK CAR CORPORATION, a corporation,

Defendant.

ANSWER

Comes now General American Tank Car Corporation, a corporation, defendant herein, and answering plaintiff's complaint on file herein, admits, denies and avers as follows: [10]

First Cause of Action

I.

Admits the allegations of Paragraph I of the first cause of action of the said complaint.

II.

Answering Paragraph II of the first cause of action of the said complaint, defendant, denies that it is doing or transacting business in the State of California, but by its answer herein defendant enters a general appearance in this proceeding.

III.

Denies each and every, all and singular, the allegations of Paragraph III of said first cause of action of the said complaint.

Second Cause of Action

I.

Answering Paragraph I of the second cause of action of the said complaint, defendant denies that it is doing or transacting business in the State of California, but by its answer herein defendant enters a general appearance in this proceeding.

II.

Answering Paragraph II of said second cause of action of the said complaint, defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegation that El Dorado Oil Works heretofore assigned to plaintiff the alleged claim against defendant referred to in the said paragraph and, basing its denial upon that ground, denies said allegation; and defendant denies each [11] and every, all and singular, of the other allegations contained in the said Paragraph II of said second cause of action.

Third Cause of Action

I.

Answering Paragraph I of the third cause of action of the said complaint, defendant denies that it is doing or transacting business in the State of

California, but by its answer herein defendant enters a general appearance in this proceeding.

II.

Answering Paragraph II of the third cause of action of the said complaint, defendant denies that in the contract referred to in the said paragraph defendant agreed to credit, on the 25th day of each month all mileage earned by said cars or so collected against the rentals then due to defendant for the use of said cars for the previous month, or to pay over to said El Dorado Oil Works any excess mileage earnings over and above said rental and service charges then found to be due from the said Oil Works to defendant; and in this behalf defendant refers to the said contract, a copy of which is attached hereto, marked Exhibit "A," as hereinafter alleged in defendant's separate answer and defense to the said complaint.

III.

Answering Paragraph III of the third cause of action of the said complaint, defendant denies that during the period between the 1st day of November, 1934, and the 31st day of May, 1935, or up to the 31st day of May, 1935, defendant has collected or received from the railroad companies, over the trackage of which the said cars were operated and employed, the sum of Eighteen Thousand Five Hundred Eighty and 88/100 Dollars [12] (\$18,580.88) in excess of the sums payable as rentals or to be credited to the said defendant under the terms

of the said contract; and in this respect defendant avers that during the said period it received from the said railroad companies the sum of Twenty-eight Thousand Five Hundred Ninety-five and 79/100 Dollars (\$28,595.79) and credited thereof the sum of Ten Thousand Nine Hundred Eighty-one and 66/100 Dollars (\$10,981.66) to the account of El Dorado Oil Works.

Fourth Cause of Action

I.

Answering Paragraph I of the fourth cause of action of the said complaint, defendant denies that it is doing or transacting business in the State of California, but by its answer herein defendant enters a general appearance in this proceeding; denies that portion of the said Paragraph I of the fourth cause of action which alleges by way of reference to Paragraph II of the third cause of action of the said complaint that in the said contract defendant agreed to credit on the 25th day of each month all mileage earned by said cars or so collected against the rentals then due to defendant for the use of said cars for the previous month and to pay over to said El Dorado Oil Works any excess mileage earnings over and above said rental and service charges then found to be due from the said Oil Works to defendant, and in this behalf defendant refers to the said contract, a copy of which is attached hereto, marked Exhibit "A," as hereinafter alleged in defendant's separate answer and defense to said complaint.

II.

Answering Paragraph II of said fourth cause of [13] action, defendant denies that from or after the 1st day of January, 1934, to or including the 31st day of October, 1934, it has collected or received from the railroad companies, over the trackage of which the said tank cars were operated and employed, the sum of Fifteen Hundred and Fifty and 16/100 Dollars (\$1,550.16) in excess of the sums payable or to be credited by El Dorado Oil Works to defendant under the terms of the said contract and in this respect avers that during the said period defendant received from the said railroad companies the sum of Twenty-two Thousand Eight Hundred Seven and 79/100 Dollars (\$22,807.79) and credited thereof, the sum of Twenty-one Thousand Eight Hundred Eighty-nine and 14/100 Dollars (\$21,889.14) to the account of the said El Dorado Oil Works; alleges that defendant has no information or belief upon the subject sufficient to enable it to answer the allegation that prior to the commencement of this action El Dorado Oil Works assigned to plaintiff the alleged claim referred to in the said paragraph and, placing its denial upon that ground, denies said allegation; admits that said El Dorado Oil Works demanded payment of the said sum of Fifteen Hundred and Fifty and 16/100 Dollars (\$1,550.16) but defendant failed and refused to pay the same or any part thereof; and denies each and all of the allegations of said paragraph other than those hereinbefore expressly admitted or specifically denied.

Fifth Cause of Action**I.**

Answering Paragraph I of the fifth cause of action of the said complaint, defendant denies that it is doing or transacting business in the State of California, but by its [14] answer herein defendant enters a general appearance in this proceeding.

II.

Defendant denies each and every, all and singular, the allegations of Paragraph II of said fifth cause of action of the said complaint.

Sixth Cause of Action**I.**

Answering Paragraph I of the sixth cause of action of the said complaint, defendant denies that it is doing or transacting business in the State of California, but by its answer herein defendant enters a general appearance in this proceeding.

II.

Answering Paragraph II of the said sixth cause of action, defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegation that heretofore El Dorado Oil Works assigned to plaintiff the alleged claim against defendant for the sum of Fifteen Hundred and Fifty and 16/100 Dollars (\$1,550.16) referred to in the said paragraph and, basing its denial upon that ground, denies the said allegation, and defendant denies each and every, all and singular,

lar, of the other allegations in said Paragraph II of said sixth cause of action contained.

Further answering the complaint and for a separate and distinct answer and defense to each of the several causes of action in plaintiff's complaint contained, defendant avers as follows: [15]

I.

That on or about the 28th day of September, 1933, defendant made and entered into an agreement with El Dorado Oil Works, a corporation, copy of which agreement is attached hereto, marked Exhibit "A," referred to and made a part hereof.

II.

That defendant has credited said El Dorado Oil Works and the plaintiff with all of the mileage earnings in the complaint and in the said agreement referred to in an amount or amounts equal to the car hire or rental reserved in said agreement; that the defendant has refused, and still refuses to credit either the El Dorado Oil Works or the plaintiff with any mileage earnings in excess of said car hire or rental reserved in said agreement for the reason that defendant was and is expressly prohibited and enjoined therefrom by law and particularly by the provisions of that certain statute of the United States of America entitled "An Act to further regulate commerce with foreign nations and among the states" (32 Stat. L. 847; 34 Stat. L. 584; U. S. Code Title 49, Sec. 41), commonly known as the Elkins

Act. In this behalf defendant avers that the said tank cars leased by defendant to the said El Dorado Oil Works as in said agreement provided were used during the times specified in the complaint in the transportation of property of the said El Dorado Oil Works over the lines of railway of common carriers subject to the said Elkins Act, and that such transportation was almost entirely in interstate or foreign commerce. That under the terms of the tariffs of such common carriers published and filed with the Interstate Commerce Commission in the manner required by law certain mileage payments were and are made by the carriers for the use of privately owned cars employed in the transportation of prop- [16] erty over the lines of railway of such common carriers, according as their respective lines of railway may run. That if defendant were to credit or to pay over to the plaintiff or to said El Dorado Oil Works any part of the mileage payments received from said common carriers by defendant, as the owner of said cars, in excess of the car hire or rental reserved in said agreement, such credit and payment would be unlawful in that plaintiff or said El Dorado Oil Works would secure the transportation of property at rates less than the rates named in the published and filed tariffs of said common carriers applicable to such transportation, thereby obtaining a rebate or concession and an advantage or discrimination, in violation of the provisions of said Elkins Act.

Wherefore, defendant prays that the complaint be dismissed, that the plaintiff take nothing, and that defendant have judgment for its costs of suit and disbursements incurred herein.

ALLAN P. MATTHEW,
JOHN O. MORAN,
McCUTCHEN, OLNEY, MANNON
& GREENE,

Attorneys for Defendant.

Service of the within answer and receipt of a copy thereof is hereby admitted this 10th day of September, 1935.

WILLIAMSON & WALLACE,
Attorneys for Plaintiff. [17]

State of California,
City and County of San Francisco.—ss. .

Allan P. Matthew, being first duly sworn, deposes and says:

That he is an attorney at law, duly authorized and licensed to practice in all of the courts of the State of California and in the United States District Court for the Northern District of the State of California; that he is one of the attorneys for defendant in the above entitled action; that affiant has his office in the City and County of San Francisco, in the said State; that the defendant is a corporation organized under the laws of the State of West Virginia, and a non-resident of the State of California; that all of its officers are non-residents of the State of California and are all outside of the

State of California, and that no one of the officers of the defendant is now within the State of California, the place where affiant has his office; that affiant makes this affidavit on behalf of the defendant by reason of the facts hereinbefore set forth; that affiant has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters that he believes it to be true.

ALLAN P. MATTHEW.

Subscribed and Sworn to before me this 7th day of September, 1935.

[Notarial Seal] CHALMER MUNDAY,

Notary Public in and for the City and County of San Francisco, State of California. [18]

EXHIBIT "A"

This agreement made and entered into this 28th day of September, 1933, by and between General American Tank Car Corporation, a West Virginia corporation, first party, and El Dorado Oil Works, a California corporation, second party:

Witnesseth:

First: First party does hereby lease and let unto second party, and second party does hereby rent and hire from first party, fifty (50) tank cars (hereinafter sometimes called "Permanent Cars"), all of which Permanent Cars shall be coiled tank cars of an approximate capacity of eight thousand (8,000)

gallons each. Said Permanent Cars shall bear the reporting marks of the First party, or any other reporting marks which the first party may elect. Said Permanent Cars are now in the service of the second party under an agreement with the first party which expires December 31, 1933, and possession of said cars under said agreement expiring December 31, 1933 shall be and it is hereby agreed to be delivery to the second party by the first party of said Permanent Cars.

Second: All tank cars without compartments and non-insulated, of six thousand (6,000) gallon, eight thousand (8,000) gallon and ten thousand (10,000) gallon capacity, without coils, or with coils up to six (6) lines, are hereinafter referred to as "standard tank cars." First party does hereby lease and let to the second party, and second party does hereby rent and hire from the first party, second party's entire requirements of standard tank cars over and above said Permanent Cars. Such cars shall bear the reporting marks of the first party, or any other reporting marks which the first [19] party may elect. Such cars shall be delivered to the second party at points on San Francisco Bay, designated by the second party, within a reasonable time after request therefor, subject to all delays due to fires, strikes, accidents, railroad embargoes and congestions, and all other and like causes beyond the control of the first party. All cars furnished hereunder, over and above said Permanent Cars shall not bear the name of the second party.

Second party covenants and agrees, in so far as it may lawfully do so, that it will use the tank cars of the first party exclusively, at all times during the term of this agreement for the second party's entire requirements of standard tank cars, including all such requirements of second party's subsidiaries and other corporations as hereinafter specified, and that it will not use any standard tank cars of others during said term, provided first party's standard tank cars are available for loading at the time, upon reasonable notice, and if not so available, second party shall have the right to use the standard tank cars of others for the period during which the first party's tank cars are not so available. The term: "entire requirements of standard tank cars" wherever used in this agreement is intended to mean and shall be construed as meaning the number of standard tank cars needed by the second party during the term of this agreement, over and above said Permanent Cars, for the transportation of the products of the second party, it being understood that the second party does and may, in its discretion, use means of transportation of the products of the second party, other than by rail, but that no other means of transportation shall be used or employed by the second party to the complete exclusion of transportation [20] by rail in standard tank cars. A particular tank car furnished by first party to the second party hereunder, over and above said Permanent Cars, shall be considered as leased to the second party when made available by first party

to second party upon reasonable notice, at points on San Francisco Bay, designated by second party, and shall continue to remain in the service of the second party until returned to the first party at Berkeley, California or Oakland, California, as second party shall determine.

The term: "second party" as used herein shall include the El Dorado Oil Works and all existing and future subsidiary companies of El Dorado Oil Works and corporations controlled, operated or managed by El Dorado Oil Works.

Third: Second party agrees to use all the tank cars furnished hereunder exclusively in its service for the transportation of its products, which products will not injure or affect the tanks, and agrees that said cars shall not be shipped beyond the boundaries of the United States, Canada or Mexico, without the written consent of the first party. Second party further agrees to pay to the first party for the use of the Permanent Cars the sum of Twenty-seven and 50/100 Dollars (\$27.50) per car per month, and for the use of the tank cars furnished hereunder, over and above said Permanent Cars, at the rate of Thirty Dollars (\$30) per car per month, for the time such cars are in the service of the second party. Said payments shall be made to the first party at its office, 940 Continental Illinois Bank Building, Chicago, Illinois. Payment of the rental on said Permanent Cars shall be made on the first day of each month in advance, without deduction, except as set forth in paragraph Sixth hereinafter.

[—OK Gen'l Amer. Tank Car Corp'n., R. T. Musser.] Payment of the [21] rental on the tank cars furnished by the first party to the second party hereunder, over and above said Permanent Cars, shall be made on the fifth (5) day of each month, immediately following any month during which any of said cars have been in the service of the second party.

Fourth: This agreement is to remain in full force and effect for a period of three (3) years beginning January 1, 1934 and ending December 31, 1936. Second party shall have the right to extend the term of this agreement for an additional period of two (2) years, that is to say, until December 31, 1938, provided that it shall give to the first party notice in writing of its election so to extend this agreement, on or before December 1, 1936. Second party agrees upon the expiration hereof, to cause all of the cars covered hereby to be returned to the first party at Berkeley, California, or Oakland, California, and from time to time to cause all of the cars over and above the Permanent Cars, to be returned to the first party at Berkeley, California, or Oakland, California, as hereinbefore provided, all of said cars to be returned in the same condition in which they were furnished, excepting for ordinary wear and tear.

Fifth: First party agrees to maintain all cars covered by this agreement in good condition and repair according to present requirements of railroad companies and existing American Railway

Association Mechanical Rules. No repairs shall be made by the second party for the account of the first party without the written consent of the first party. If any of said cars be held in railroad or car shops for repairs for a period longer than five (5) days from the date when the damage to or wreck of such car is reported to the first party, then and in that [22] event, rental or service charges covering such car shall cease from and after such period of five (5) days until such car is released from the shop, or until such car has been replaced by first party by another car. The first party shall have the right to substitute for any car leased hereunder, another car of the same type and capacity. The first party shall not be liable for any damage to or loss of the whole or any part of any shipment made in any of the cars covered by this agreement, nor for any loss or damage arising through injuries or fatalities to persons, nor for destruction of or damage to said cars or any other property, which may be caused by any explosion or breaking of said cars, or any parts thereof, or the use of said cars, and said second party agrees to protect and save harmless said first party from any such loss or damage to persons or property. If any of said cars are damaged or destroyed while on any privately owned tracks, the second party shall pay unto the first party the cost of repairing such damage or replacing such destroyed car or cars. The second party shall replace any removable tank parts (dome lids, outlet caps, safety valves, etc.), if lost or broken.

Sixth: The First party shall collect all mileage earned by the cars covered by this agreement and keep all records appertaining to their movements. Second party shall assist first party in following the movements of said cars by furnishing to the first party complete reports of the movements of cars, giving date, routing, and destination of each movement. The first party shall each month credit to the rental or service account of the second party all mileage earned by said cars while in the service of second party according to and subject to all rules of the tariffs of the railroads. Said mileage credit shall be reported to the second party on or about the twenty-fifth (25th) [23] day of the month succeeding the month during which such mileage is earned. The second party agrees so to use said cars that their mileage under load shall be equal to their mileage empty on each railroad over which they move. Should the empty mileage on any railroad exceed the loaded mileage, the second party shall immediately upon the expiration or termination of this agreement, pay to the first party for such excess, as so much additional rental or service charge at the rate established by the tariff of the railroad on which such excess of empty mileage is incurred.

Seventh: It is mutually agreed that time of payment of rental or service charges is of the essence of this contract, and that if the second party shall make default in the payment of the rental or service charges for said cars at the time when the same become due, and payable, and such default shall continue for five (5) days, or shall make default in the

performance of any of the other agreements herein contained to be by it performed, and such default, other than the non-payment of the rental or service charges shall continue for a period of thirty (30) days after written notice thereof, then and in any of said events the first party may terminate this agreement at its election, and the same shall become and be terminated, or may, at its election, take said cars out of the service of the second party and furnish the same or any thereof to others for such rental or service charges and upon such terms as it may see fit, and if a sufficient sum shall not be thus realized after paying all expenses of retaking said cars and collecting the earnings thereof to satisfy the rental or service charges herein reserved, the second party agrees to satisfy and pay any and all such deficiency promptly upon demand from time to time. [24]

Eighth: This agreement shall be binding upon the parties hereto, their respective successors, representatives, administrators, and executors, but shall not be transferrable by operation of law, or assignable by the second party, nor shall any rights hereunder with respect to said cars be transferred or assigned by the second party without the written consent of the first party. Should a petition in bankruptcy or a petition for a receiver be filed by or against the second party, or should it make an assignment for creditors, then this agreement may, at the option of the first party, be and become terminated. No title or leasehold or property interest of any kind in said cars, or any of them shall vest in

the second party or its successors or assigns under the terms and provisions of this service contract, or by reason of the delivery of possession of cars to the second party or its use thereof hereunder. No lettering or marking of any kind shall be placed upon said cars or any of them by the second party.

In Witness Whereof, the parties hereto have caused this instrument to be executed by their respective duly authorized officers, and attested by their Secretaries, and corporate seals to be hereunto affixed the day and year first above written.

**GENERAL AMERICAN TANK
CAR CORPORATION;**

By LEROY KRAMER,

Vice President.

Attest:

W. S. HEFFERAN, JR.,

Secretary.

EL DORADO OIL WORKS,

By W. B. REIS,

President.

Attest:

S. M. HASLETT,

Secretary.

[Endorsed]: Filed Sep. 10, 1935. [25]

[Title of District Court and Cause.]

STIPULATION WAIVING JURY.

It is hereby stipulated by and between the parties to the above entitled action that the trial of the above entitled cause may be, and the same shall be, tried before the above entitled Court, sitting without a jury, and each of the parties hereto hereby waives its right to demand a jury for the trial of the above entitled cause.

WILLIAMSON & WALLACE,

Attorneys for Plaintiff.

**McCUTCHEN, OLNEY, MANNON &
GREENE,**

Attorneys for Defendant.

[Endorsed]: Filed Jan. 27, 1936. [26]

[Title of District Court and Cause.]

**FINDINGS OF FACT AND CONCLUSIONS
OF LAW.**

The above entitled cause came on regularly for trial and was tried before the Court, Honorable Harold Louderback sitting as Judge thereof, a jury having been waived by written stipulation filed by the parties. The parties appeared by their respective counsel and evidence, both oral and written, was introduced. The cause was argued orally and upon briefs and duly submitted for decision. The Court having considered [27] the evidence and the law applicable thereto and being fully advised

in the matter, hereby makes its decision and its findings of fact and conclusions of law.

Findings of Fact.

The Court finds the facts to be as follows:

I.

Plaintiff is a corporation, wholly owned and controlled by El Dorado Oil Works, a corporation engaged in the production and shipment of cocoanut oil. Defendant, General American Tank Car Corporation is the owner of certain tank cars and is engaged, among other things, in furnishing these cars under contract to shippers for the transportation of cocoanut oil and other liquid commodities.

II.

On September 28, 1933, defendant entered into a written agreement with El Dorado Oil Works with respect to the furnishing of tank cars for use by said El Dorado Oil Works in the transportation of its products. A copy of said agreement is attached as "Exhibit A" to the defendant's answer to the complaint. On or about October 31, 1934, said El Dorado Oil Works assigned and transferred all of its right, title and interest in and to said agreement, and in the cars therein referred to to plaintiff. Defendants consented to said assignment. Plaintiff has been a wholly owned and controlled subsidiary of said El Dorado Oil Works at all times since the making of said assignment. Prior to the commencement of this action and on May 1, 1935,

said El Dorado Oil Works duly assigned and transferred to plaintiff by written instrument all claims and demands of said El Dorado Oil Works against defendant arising out of said [28] agreement.

Under said agreement defendant leased to said El Dorado Oil Works 50 tank cars, which are referred to in the agreement as "permanent cars", at the rental of \$27.50 per car per month. The said agreement also provided that defendant would furnish said El Dorado Oil Works its entire requirement of tank cars over and above the 50 permanent cars, at a rental of \$30. per car per month. It was further provided that defendant should each month credit to the rental or service account of said El Dorado Oil Works all mileage earned by the cars while in the service of said El Dorado Oil Works, according and subject to all rules of the tariffs of the railroad common carriers over whose lines said cars should be transported. The said agreement was to remain in effect for a period of three years beginning January 1, 1934, and ending December 31, 1936. The said El Dorado Oil Works was given the right to extend the term of said agreement for an additional two years provided it gave defendant notice in writing on or before December 1, 1936, of its election so to extend said agreement.

III.

The tank cars leased by defendant to said El Dorado Oil Works and to plaintiff as provided in said agreement were used during the times specified in said complaint in the transportation of property

of said El Dorado Oil Works and of plaintiff over the lines of railway of common carriers subject to that certain statute of the United States of America entitled "An Act to further regulate commerce with foreign nations and among the states" (32 Stat. L. 847; 34 Stat. L. 584; U. S. Code Annotated, Title 49, Sec. 41), commonly known as the [29] Elkins Act. Such transportation was almost entirely in interstate or foreign commerce. More specifically, ninety-nine (99) per cent or more of said shipments in said tank cars were interstate in character. Under the terms of the tariffs of said common carriers published and filed with the Interstate Commerce Commission in the manner required by law certain mileage payments were and are made by such carriers for the use of privately owned cars employed in the transportation of property over the lines of railway of such common carriers, according as their respective lines of railway may run.

IV.

During the period extending from January 1, 1934, to June 30, 1934, it was the practice of defendant under said agreement to credit to said El Dorado Oil Works all of the mileage earnings collected and received on said tank cars from said common carriers and to pay over to said El Dorado Oil Works each month all of said mileage earnings in excess of the car hire or rental reserved in said agreement. On July 2, 1934, the Interstate Commerce Commission rendered its decision in I. & S.

Docket No. 3887, Use of Privately Owned Refrigerator Cars, 201 I. C. C. 323. A copy of said decision, marked "Exhibit 1," is attached to and made a part of the stipulation of facts entered into between plaintiff and defendant and presented in this proceeding. Following the rendition of said decision defendant was advised by counsel and concluded that the crediting and payment to plaintiff of mileage earnings, received from the aforesaid railroad companies, in excess of the car hire or rental reserved in said agreement was prohibited by and would be in violation of said Elkins Act. As a consequence of such decision and such advice and conclusion defendant has refused to pay over to said [30] El Dorado Oil Works or to plaintiff such excess mileage earnings collected by defendant after May 31, 1934.

V.

During the period from the 1st day of January, 1934, to and including the 31st day of October, 1934, defendant collected and received from the railroad companies, over whose lines of railway the shipments involved were transported, the sum of \$22,807.79 and credited thereof the sum of \$21,889.14 to the account of El Dorado Oil Works. The amount of the mileage earnings, in excess of the car rental, withheld by defendant for said period was and is the sum of \$918.65. During the period between the 1st day of November, 1934, and the 31st day of May, 1935, defendant collected and received from the railroad companies, over whose lines of railway the

shipments involved were transported, the sum of \$28,595.79 and credited thereof the sum of \$10,981.66 to the account of plaintiff. The amount of the mileage earnings, in excess of the car rental, withheld by defendant for said period was and is the sum of \$17,614.13. The total mileage earnings, in excess of the car rental, withheld by defendant for the entire period from January 1, 1934, to May 31, 1935, were and are the sum of \$18,532.78. Defendant has credited said El Dorado Oil Works and plaintiff with all of the mileage earnings in the complaint and in said agreement referred to, in an amount or amounts equal to the car hire or rental reserved in said agreement.

VI.

There was and is no corporate relationship between defendant, General American Tank Car Corporation, and any of said rail carriers over whose lines of railway said shipments [31] of El Dorado Oil Works and plaintiff were transported.

Conclusions of Law

From the foregoing facts the Court concludes:

I.

That defendant was and is prohibited and enjoined by law, and particularly by the provisions of that certain statute of the United States of America entitled "An Act to further regulate commerce with foreign nations and among the states" (32 Stat. L. 847; 34 Stat. L. 584; U. S. Code Annotated, Title 49, Sec. 41), commonly known as the Elkins Act,

from crediting or paying to either plaintiff or El Dorado Oil Works any mileage earnings received from said common carriers in excess of said car hire or rental reserved in said agreement.

II.

That, if defendant were to credit or to pay over to plaintiff or to said El Dorado Oil Works any part of the mileage payments received from said common carriers by defendant, as the owner of said tank cars, in excess of the car hire or rental reserved in said agreement, such credit or payment would be unlawful in that plaintiff or said El Dorado Oil Works would secure the transportation of property at rates less than the rates named in the published and filed tariffs of said common carriers applicable to such transportation, thereby obtaining a rebate or concession and an advantage or discrimination, in violation of the provisions of said Elkins Act.

III.

That plaintiff was lawfully entitled to receive and defendant was lawfully required to pay over to plaintiff under the terms and provisions of said agreement only such car mileage [32] earnings as were not in excess of the car hire or rental reserved in said agreement.

IV.

That defendant is entitled to judgment herein and to recover against plaintiff its costs herein incurred.

HAROLD LOUDERBACK

District Judge

Approved as to form, as provided in Rule 22.

WILLIAMSON & WALLACE

Attorneys for Plaintiff.

Receipt of a copy of the within Findings of fact and conclusions of law. Admitted this 30th day of July, 1937.

WILLIAMSON & WALLACE

Attorneys for Plaintiff.

[Endorsed]: Filed Sep. 2, 1937. [33]

In the Southern Division of the United States District Court for the Northern District of California.

No. 19,929-L

EL DORADO TERMINAL COMPANY, a corporation,

Plaintiff,

vs.

GENERAL AMERICAN TANK CAR CORPORATION, a corporation,

Defendant.

JUDGMENT

The above entitled cause came on regularly for trial and was tried before the court, Honorable Harold Louderback sitting as judge thereof, a jury having been waived by written stipulation filed by the parties. The parties appeared by their respective counsel, and evidence, both oral and written,

[34] was introduced. The cause was argued orally and upon briefs and duly submitted for decision, and the court, after due consideration, having rendered its decision and filed its Findings of Fact and Conclusions of Law and having ordered that plaintiff take nothing by its said action and that defendant have judgment against plaintiff for its costs herein incurred,

Now, Therefore, by virtue of the law and by reason of said Findings of Fact and Conclusions of Law, It Is Hereby Ordered, Adjudged and Decreed, that plaintiff above named, El Dorado Terminal Company, take nothing by its said action, and that defendant, General American Tank Car Corporation, do have and recover of and from said plaintiff its costs and disbursements in this action, taxed at the sum of Sixty-two and 40/100 Dollars (\$62.40).

Judgment entered this 2nd day of September, 1937.

WALTER B. MALING

Clerk

Approved as to form, as provided in Rule 22.

WILLIAMSON & WALLACE

Attorneys for Plaintiff

Judgment entered in Judgment Register 16 at
Page 598. [35]

[Title of District Court and Cause.]

ENGROSSED BILL OF EXCEPTIONS

Engrossed Bill of Exceptions of plaintiff El Dorado Terminal Company, a corporation, in the above entitled action, to be used upon said plaintiff's appeal from the judgment in said action and for any and all purposes for which a bill of exceptions can properly be used.

Be It Remembered that the above entitled action was commenced in the Superior Court of the State of California, in and for the City and County of San Francisco, by the filing of the plaintiff's complaint in the office of the County Clerk of the [36] City and County of San Francisco, State of California, and ex officio Clerk of said Superior Court. Said action as so commenced was entitled as above and numbered on the files of said Superior Court, No. 259305. Thereafter defendant General American Tank Car Corporation duly presented to said court and filed its petition for removal of said cause into the above entitled court and its bond in connection therewith and duly served and filed notice of presentation of said petition and bond, and thereafter in said Superior Court such proceedings in said cause were duly taken and had, that said petition was granted and said bond was approved and said court made its order removing said cause from said Superior Court and into the above entitled court. Thereafter petitioner and defendant General American Tank Car Corporation duly filed in the above entitled court and in the office of the clerk thereof a duly certified copy of the Record of all

of the papers that had been filed and all proceedings had in said Superior Court and duly served upon plaintiff notice of filing of said record in the above entitled court. Thereafter said defendant duly appeared and duly served and filed its answer in the above entitled cause and court. Pursuant to notice duly given by said plaintiff to said defendant, and in accordance with stipulation duly entered into by and between the parties to the above entitled cause, the depositions of Donald H. Smith, Thomas B. Kais, and Arthur A. Solenke were duly taken on December 9th and 10th, 1935, in Chicago, Illinois in the presence of counsel of both parties. On October 28, 1936, the above entitled cause came on duly and regularly for trial in the above entitled court before the Honorable Harold Louderback, District Judge, duly designated and assigned therefor. Said cause was tried before said court sitting without a jury, a jury trial having been duly waived by written stipulation of the parties filed with said court. [37]

Said cause was tried on October 28, 1936, and February 27, 1937. Between said dates an opening brief for plaintiff, a brief for defendant, and a reply brief for plaintiff were duly served and filed in said cause, and on February 27, 1937, said cause was duly argued orally before said court and submitted to the court by both parties."

On said trial said plaintiff duly appeared by its attorneys, Messrs. Williamson & Wallace and R. P. Norton, Esq., and the defendant by its attorneys, Messrs. McCutchen, Olney, Mannon & Greene,

Allan P. Matthew, Esq., and John O. Moran, Esq. Thereupon the following proceedings and none other were taken and had and the following evidence, both oral and documentary, and none other, was offered and introduced, all as more particularly appears as follows:

Mr. Williamson made an opening statement on behalf of plaintiff, in the course of which he said:

The plaintiff in this case is the El Dorado Terminal Company claiming as an assignee in part of the El Dorado Oil Works. The companies are affiliated; the Terminal Company is wholly owned by the Oil Works. The action grew out of these facts: On September 28, 1933, the General American Tank Car Corporation, a West Virginia corporation, with headquarters in Chicago, and which operated in California, made a contract with the El Dorado Oil Works, an oil manufacturing company, a California corporation, under the terms of which the Tank Car Corporation leased to the oil works fifty tank cars for a period of years, and such additional cars as the oil works would require for the transportation of coconut oil from the plant of the Oil Works in West Berkeley to various points in the middle west, and in some instances to eastern states. A monthly rental was to be paid by the Oil Works to the Tank Car corporation for the [38] use of those cars. In turn, the Tank Car corporation agreed to credit a refund or repayment to the Oil Works on the mileage earned by those cars in excess of the rental paid. So that if the Oil Works were called upon to pay monthly in advance the rental of \$30 for each

car used in the movement of their product, and if it should earn in excess of \$30, that excess was to come back to the Oil Works. Pursuant to the agreement, the cars were furnished and were used.

The railroads then had a tariff; that tariff was paid by the shipper or the consignee; in this instance the full freight was always paid, but it was paid by the consignees and not by the Oil Works. The railroad then under its tariff regulations made an allowance to the owner or the lessee of the cars theoretically as compensation for the furnishing of those cars which the railroad did not furnish and did not hold themselves out as furnishing. That is what we speak of in this case as "mileage". In pursuance of the contract the cars were moved from the West Berkeley plant of the El Dorado Oil Works to these various consignees who, in turn, paid the fixed tariff rates or charges without reduction. The tank car company at regular intervals, that is, monthly, accounted to the El Dorado Oil Works for the mileage earned and received, and remitted for it to the Oil Works up to July 1, 1934; that is to say, from the commencement date of the contract, January 1, 1934, until the end of June, 1934. That Tank Car corporation having received the money on the mileage from the railroad, paid the mileage above the rentals to the company, in accordance with the provisions of its contract and without question. The reason for the change on the part of the Tank Car Corporation, as disclosed, was this: That in July, 1934, the Interstate Commerce Commission rendered a decision, with a consonant order,

applicable to refrigerator cars. In that [39] order it prohibited, in effect, refunds in the nature of rebates to the owners and operators of refrigerator cars, mostly in and about Chicago, because those refunds or rebates were, in effect, preferences of preferential payments in favor of those shippers who had those cars and was not enjoyed generally by all.

We say that it is absolutely in terms limited to refrigerator cars.

The next point advanced by the Tank Car Corporation as a reason for discontinuing the payments required under this contract was that such payments were in violation of the provisions of the so-called Elkins Act. Our position is that the Elkins Act does not apply and that the decision by the Interstate Commerce Commission likewise does not apply, and that the contract calls for the payments. They paid up to the time of the decision, and they should have paid from then on.

Mr. Matthew made an opening statement on behalf of the defendant, in the course of which he said:

It should be stated that the clause of the contract which refers to the collection by the defendant of the mileage earnings from the rail carriers provides for the crediting of those payments to the El Dorado Oil Works, the other party to the contract. The railroads provide in their tariffs that a certain allowance of so much per mile—I think in the case of tank cars $1\frac{1}{2}$ cents per mile—shall be allowed for the use of the car in railroad service. Under the terms of the contract the General American Tank

Car Corporation did, up to mid-summer of 1934, credit the El Dorado Oil Works, or later its assignee, the El Dorado Terminal Company, the plaintiff here, with the full amount of these mileage earnings credited to the Tank Car Corporation by the rail carriers, even when the amount exceeded the rental which the El Dorado Oil Works was required to pay to the General American Tank [40] Car Corporation under the terms of the agreement of September 28, 1933.

After the decision of the Interstate Commerce Commission was announced in the refrigerator car case, the defendant concluded that it would be unlawful to continue further with the payment of any portion of the mileage received from the carriers in excess of the rental which the El Dorado Oil Works was obligated to pay for the use of the cars. Since that time, in the summer of 1934—more particularly about the end of May, 1934, the defendant has credited the Oil Works, or its successor, the El Dorado Terminal Company, as the assignee, with mileage earnings in the amount of the rental reserved for the use of the cars, deeming that any greater payment would be unlawful.

I might briefly call your Honor's attention to our defense, as set forth on page 7 of the answer. It is very brief, and I would like to read it because I think it would tend to make the issue very clear in your Honor's mind:

Paragraph II, line 6, page 7 of the answer, reads as follows: "That defendant has credited said El Dorado Oil Works and the plaintiff with all of the

mileage earnings in the complaint and in the said agreement referred to in an amount or amounts equal to the car hire or rental reserved in said agreement; that the defendant has refused, and still refuses, to credit either the El Dorado Oil Works or the plaintiff with any mileage earnings in excess of said car hire or rental reserved in said agreement, for the reason that defendant was and is expressly prohibited and enjoined therefrom by law and particularly by the provisions of that certain statute of the United States of America entitled 'An Act to further Regulate Commerce with Foreign Nations and Among the States'—commonly known as the Elkins Act. In this behalf defendant avers that the said tank cars leased by defendant to the said El Dorado Oil Works [41] as in said agreement provided were used during the times specified in the complaint in the transportation of property of said El Dorado Oil Works over the lines of railway of common carriers subject to the said Elkins Act, and that such transportation was almost entirely in interstate or foreign commerce. That under the terms of the tariffs of such common carriers published and filed with the Interstate Commerce Commission in the manner required by law certain mileage payments were and are made by the carriers for the use of privately owned cars employed in the transportation of property over the lines of railway of such common carriers, according as their respective lines of railway may run. That if defendant were to credit or to pay over to the plaintiff or to said El Dorado Oil Works any part of the mileage pay-

ments received from said common carriers by defendant, as the owner of said cars, in excess of the car hire or rental reserved in said agreement, such credit and payment would be unlawful in that plaintiff or said El Dorado Oil Works would secure the transportation of property at rates less than the rates named in the published and filed tariffs of said common carriers applicable to such transportation, thereby obtaining a rebate or concession and an advantage or discrimination, in violation of the provisions of said Elkins Act."

I have read that to your Honor because I think it will assist you, in showing to your Honor what the real issue between the parties is.

Mr. Williamson then offered in evidence and read the following stipulation signed by counsel for both parties:

"It is hereby stipulated and agreed by and between El Dorado Terminal Company, a corporation, the plaintiff in the above-entitled action, hereinafter referred to as "plaintiff", and General American Tank Car Corporation, a corporation, the defendant in the above-entitled action, hereinafter referred to as "defendant," as follows: [42]

I.

"That the answer filed by the defendant in the above-entitled action correctly alleges and sets forth the sums collected and received by defendant from the railroad companies, over whose lines of railway the shipments of plaintiff and of El Dorado Oil Works involved were transported, and also cor-

rectly alleges and sets forth the sums thereof credited by defendant to the account of plaintiff and of El Dorado Oil Works during the periods covered by the complaint filed by the plaintiff in the above-entitled action; that, in particular, during the period between the 1st day of November, 1934, and the 31st day of May, 1935, or up to the 31st day of May, 1935, defendant collected and received from said railroad companies the sum of Twenty-eight thousand five hundred ninety-five and 79/100 (\$28,595.79) dollars and credited thereof the sum of Ten thousand nine hundred eighty-one and 66/100 (\$10,981.66) dollars to the account of the plaintiff; that during the period from the 1st day of January, 1934, to and including the 31st day of October, 1934, defendant collected and received from said railroad companies the sum of Twenty-two thousand eight hundred seven and 79/100 (\$22,807.79) dollars and credited thereof (the sum of Twenty-one thousand eight hundred eighty-nine and 14/100 (\$21,889.14) dollars to the account of El Dorado Oil Works."

II.

"That a full, true and correct copy of the contract made and entered into by and between defendant and El Dorado Oil Works on September 25, 1933, and referred to in the third and fourth causes of action of said complaint, is attached as Exhibit A to defendant's answer to said complaint filed in the above-entitled action.

III.

"That the tank cars leased by defendant to El Dorado Oil Works and to plaintiff as provided in said contract were used [43] during the times specified in said complaint in the transportation of property of, said El Dorado Oil Works and of plaintiff over the lines of railway of common carriers subject to that certain statute of the United States of America entitled: "An Act to Further Regulate Commerce with Foreign Nations and Among the States" (32 Stat. L. 847; 34 Stat. L. 584; U. S. Code Annotated, Title 49, Sec. 41) commonly known as the Elkins Act; that such transportation was almost entirely interstate or foreign commerce; that, more specifically, 99 per cent or more of said shipments in said tank cars were interstate in character.

IV.

"That on or about October 31, 1934, said El Dorado Oil Works assigned and transferred all of its right, title and interest in and to said contract, and in cars therein referred to, to plaintiff; that defendant consented to said assignment; that plaintiff is, and at all times, since the making of said assignment has been, a wholly owned and controlled subsidiary of said El Dorado Oil Works.

V.

"That during the period extending from January 1, 1934, to June 30, 1934, it was the practice of defendant under said contract to credit to said El Dorado Oil Works all of the mileage earnings

collected and received on said tank cars and to pay over to said El Dorado Oil Works each month all of said mileage earnings in excess of the car hire or rental reserved in said contract; that on July 2, 1934, the Interstate Commerce Commission rendered its decision in I & S Docket No. 3887, Use of Privately Owned Refrigerator Cars, 201 I C C 323; that a copy of said decision is attached thereto, marked "Exhibit 1", and made a part hereof by reference; that following the rendition of said decision defendant was advised by counsel and concluded that the crediting [44] and payment to plaintiff of mileage earnings, received from the afore-said railroad companies, in excess of the said car hire or rental reserved in said contract was prohibited by and would be in violation of said Elkins Act; that as a consequence of such decision and such advice and conclusion defendant has refused to pay over to said El Dorado Oil Works or to plaintiff such excess mileage earnings collected by defendant after May 31, 1934.

VI.

"That there was and is no corporate relationship between defendant General American Tank Car Corporation and any of said rail carriers over whose lines of railway said shipments of plaintiff were and are being transported." [45]

EXHIBIT 1

19685

Interstate Commerce Commission

Investigation and Suspension Docket No. 3887¹
Use of Privately Owned Refrigerator Cars

Submitted May 1, 1934. Decided July 2, 1934

1. Proposed amendment to rule 35 of the perishable protective tariff I. C. C. no. 5 found justified.
2. Proposed section 1 of rule 36 of said tariff found not justified without prejudice to respondents filing an amended section conforming to our suggestions herein.
3. It is the duty of common carriers by railroad to furnish such cars as may reasonably be necessary for the transportation of all commodities they hold themselves out to carry.
4. Carriers have the exclusive right to furnish cars. A private-car owner has no right to have his cars used as a vehicle for the transportation of freight over the rails of any carrier without s consent.
5. Payment in whole or in part to shippers, including meat packers, of mileage allowance by

¹This report also embraces Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part V, Private Freight Cars.

railroads, either direct or through car owners, in excess of the amount of rental such shippers pay for the use of the cars and other actual expenses in connection therewith, results in such shippers receiving transportation of their products at lower rates than those paid by shippers generally who use cars furnished by the carriers, and at less than the published rates.

6. Any allowance paid to the shipper-owner of private cars, including meat packers and their operating subsidiaries or agents, by railroads for the use of such cars in excess of the ownership cost, including a fair return on the investment, are unreasonable, unjustly discriminatory, and unlawful rebates and concessions.

Daniel H. Kunkel for the Commission.

E. H. Burgess, A. H. Kiskaddon, Walter McFarland, William F. Peter, W. C. Ranous, H. H. Larimore, B. H. Stanage, L. H. Strasser, P. F. Gault, L. C. Jorgensen, Elmer A. Smith, B. F. Batts, F. H. Towner, J. N. Davis, A. B. Enoch, J. A. Gallaher, J. P. Plunkett, D. C. Edwards, M. L. Countryman, Jr., and M. G. Roberts for railroad protestants.

D. C. Ellis, Earle R. Ballard, H. D. Bergen, Clifford H. Browder, C. D. Dooley, G. C. George, Nelson B. Green, G. A. Heinze, James J. Hoban, A. C. Hultgren, J. R. Van Slyke, John H. C. Kirk, Wilbur La Roe, Jr., Arthur L. Winn, Jr., Edward F. Ledwidge, Virgil E. McKeever, J. L. Roberts, Thomas J. Rowan, Herbert Schroeder, P. P. Steury,

George R. Sweeney, L. L. Thoms, F. B. Townsend, W. M. Tuohy, J. E. Bell, F. M. Bremmer, Geo. T. Rohrback, E. F. Scott, O. W. Tong, C. H. Reddick, S. L. Foete, G. E. Saddy, F. L. Thomas, Frank A. Powers, T. F. Dooley, Warren H. Wagner, Fayette B. Dow, H. W. MacArthur, Walker Wilson, M. H. Chapman, H. L. McReynolds, M. S. Hartman, Harrison F. Jones, Wm. R. Brown, Jesse M. Watkins, C. E. Donaldson, Parker McColleston, Arvid B. Tanner, Oscar G. Meyer, and Luther M. Walter for shipper protestants and shippers appearing in Ex parte 104.

C. R. Hillyer and Harry E. Kelly for car-line protestants.

D. P. Connell, Leo F. Wormser, Frank R. Watkins, R. J. Belson, Horace M. Wigney, Douglas Campbell, Arthur E. Bristol, W. S. Hefferan, Jr., Douglass Pillinger, Jervis Langdon, Jr., and Wm. M. Kelly for other car lines.

M. B. Pierce, C. S. Burg, A. H. Lossow, Edward D. Mohr, J. M. Souby, J. R. Bell, W. J. Larrabee, Charles R. Webber, H. V. Spike, R. S. Outlaw, Guernsey Orcutt, W. N. McGehee, and Thomas P. Healy for other railroads respondents in Ex parte 104.

George Patterson Boyle, R. O'Hara, and R. D. Rynder for meat packers not protestants.

Alfred P. Thom, Jr., and R. V. Fletcher for American Railway Association.

Report of the Commission

By the Commission:

By schedules filed to become effective June 1, 1933, respondents proposed to eliminate from rule 35, paragraph B, of the perishable protective tariff. I. C. C. no. 5, the words "or brine tank refrigerator cars." By this elimination the carriers will hold themselves out to furnish such cars. By the same schedules they propose to change rule 36 by adding as section 1 thereto the following:

(A) Carriers reserve the right to furnish and will furnish refrigerator cars required for the transportation of commodities shown in item 1130 of tariff, as amended, offered for shipment and which require protective service.

(B) Shippers must arrange for their refrigerator car supply through the carrier or carriers serving them. Carriers may provide special type of refrigerator cars for the shipment of commodities shown in item 1130 of tariff, as amended, requiring protective service.

(C) Carriers will not accept in interchange empty refrigerator cars intended for loading on their lines unless specifically arranged for by them.

Exception.—Inasmuch as carriers are not in position to furnish refrigerator cars suitable for the transportation of all commodities of meat-packing companies, nothing in paragraphs A, B, and C will prevent the use of refrigerator cars, acquired by ownership or otherwise, by meat-packing companies for the

handling of commodities shown in item 1130 of tariff, as amended, requiring protective service, shipped by or consigned to them.

(D) Cars of private-car lines, including those of railroad control, will not be furnished by carriers for loading on their lines unless car owners certify under oath to carriers that no gift, gratuity, or part of the earnings from mileage payments, or otherwise, will be paid directly or indirectly to shippers, their agents or employees. The requirements of this rule will be considered as having been complied with when certification is made by car owners and filed with the Car Service Division of the American Railway Association, they in turn to notify carriers of the filing of such certificates.

(E) On and after the effective date of this rule advertisements of shippers or products are prohibited on newly constructed or repainted-refrigerator cars.

(F) Effective January 1, 1937, no refrigerator cars bearing advertisements of any shipper, consignee, or product, will be accepted in interchange or handled locally on any railroad.

(G) Nothing in these rules shall be construed to prevent any carrier or carriers from loading, or permitting to be loaded, refrigerator cars with clean freight which will in nowise render cars unfit for transporting perishable products or commodities shown in item 1130 of tariff, as amended, requiring protective service, for movement to or in the direction of the

MICRO CARD

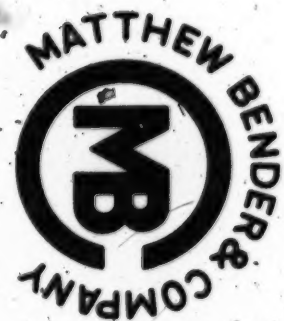
TRADE

MARK



22

39



1168

65



owner or in reasonably direct home route when such handling is in the interest of economy in operation and elimination of empty mileage.

(H) The provisions of this section will not be applicable on traffic originating in territory covered by section no. 2 of this rule.

Section 2 of the rule effective January 1, 1929, which is not in issue, applies in the territory—

west of El Paso, Texas; Albuquerque or Belen, New Mexico; west of a line following the Oregon Short Line Railroad and Los Angeles and Salt Lake Railroad, Ogden, Utah, to Nephi, Utah, via Salt Lake City and Provo, Utah, or north or west of Pocatello, Idaho, or south of Portland, Oregon.

Section 1 was made inapplicable to the territory described because restrictions similar to those provided in section 1 are now in effect there.

• A number of shippers, principally those handling butter, eggs, cheese, and dressed poultry, hereinafter referred to collectively as dairy products, and canned goods, from or to points in western trunk-line and Mountain-Pacific territories, and some private-car lines, filed protests against the proposed rule. Subsequently, 23 carriers, mostly those operating in western territory, filed a petition asking that we reconsider our refusal to approve a sixth-section application seeking authority to cancel their participation in the above rule on one day's notice, or to suspend the operation of that rule. The operation thereof was suspended until January 1, 1934, and has since been voluntarily suspended.

On our own motion, July 6, 1931, we instituted a proceeding of inquiry and investigation designated Ex parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses. To facilitate the investigation different phases were considered separately and assigned part numbers. Part V, Private Freight Cars, deals with conditions surrounding and attending the use of cars owned or operated by persons or corporations, other than common carriers by railroad, but including carrier-controlled corporations. September 1, 1931, questionnaires were sent to all carriers and 503 operators of private-car lines. After a study thereof, part V was set down for hearing with the investigation and suspension proceeding. The records were consolidated so far as they deal with refrigerator cars.

The burden of justifying the proposed rules was borne by the American Railway Association, hereinafter referred to as the association. Its president was its only witness. His testimony is based principally on statements and complaints, written and oral, made to the association by various western carriers. His information, and consequently his testimony, was very general in character. He was not familiar with the details of the facts or the extent of the abuses which gave rise to the carriers' representations, and the individual carriers did not present any witness to assist him.

The president of the General American Car Corporation also testified in support of the suspended rule.

The term "private-car line" is used hereinafter to designate organizations or corporations sup-

ported by private, as distinguished from railroad, capital that control or own a number of cars which they place in the service of railroads or shippers, and whose principal income is derived from compensation for the use of such cars. The term "carrier-controlled lines" is used to designate independently operated corporations engaged in a business similar to that of the private-car lines, the stock of which is owned by one or more railroads. The term "railroad-owned cars" is used to designate cars owned and operated by one railroad. The term "railroad cars" is used to cover railroad-owned cars and cars furnished under contract to railroads by private or railroad-controlled car lines to enable such railroads to meet their obligations to furnish suitable equipment to shippers. The term "private car" is used to describe a car owned by, or leased, rented, or assigned to, a shipper for his exclusive use by a private or railroad-controlled car line.

Early in 1927, some of the railroads in western territory called the association's attention to the growth of the practice, by private-car lines, of leasing refrigerator cars to shippers, and painting the shippers' advertisements thereon. They stated that the practice caused unnecessary empty hauls, cross hauls, and uneconomical terminal services, and forced railroad equipment to remain idle.

After consideration, the association decided that the practice should be stopped. With that end in view, 10 meetings, beginning early in 1927 and extending over a period of nearly a year and a half,

were held, with representatives of private-car lines. On July 12, 1928, an agreement was reached, by which the private-car lines were obligated, inter alia, not to extend the practice of leasing cars, to discontinue the painting of advertisements on cars, and to remove such advertisements from cars then under lease, as soon as existing contracts expired. The car companies also agreed to furnish the car-service division of the association information as to contracts then in force. The preamble of agreement reads as follows:

Recently private line refrigerator car owners, and some railroads, have assigned refrigerator cars to individual shippers or industries for their exclusive use which have subsequently been painted with the industrial advertisements or trade marks. This has the effect of withdrawing such cars from general refrigerator car service, the promotion of uneconomical car handling and methods, also, such practice is not in harmony with the requirements of one of the established rules of the American Railway Association—Car Service Rule No. 12.

The agreement did not have the desired effect and, following further meetings to discuss the alleged violations of the agreement, the board of directors of the association April 22, 1929, adopted a resolution to the effect that, unless the efforts of private-car lines to supply refrigerator cars to shippers were discontinued, it would be necessary for the railroads to promulgate rules and regulations prohibiting the movement or acceptance in

interchange of all equipment containing shippers' advertisements. Copies of that resolution were distributed to all known private refrigerator-car owners and to investment bankers in Boston, Mass., New York, N. Y., Philadelphia, Pa., Cleveland, Ohio, and Chicago, Ill.

Further meetings followed but apparently without avail, and on May 7, 1931, the association addressed a letter to all railroads, private-car lines, and refrigerator-car builders quoting the following agreement of carrier-controlled lines:

It is agreed that railroad controlled refrigerator car lines will not lease refrigerator cars to shippers, provided all other private refrigerator car lines and car builders and railroads owning refrigerator cars will also agree to discontinue leasing or assigning such cars to shippers.

It was asked that they make a similar agreement. Because some private-car lines failed to do so, the association August 3, 1931, released those which had agreed. Failing by cooperative effort to stop the practice of leasing cars to shippers, the association took the matter up with the carriers operating west of Chicago to determine whether section 2, of the rule heretofore mentioned, should be extended to cover the western territory not embraced therein. Originally it was intended to make that rule effective only in western territory, but the eastern and southern lines, learning of the contemplated action, asked that the application of the rule be extended to cover the entire country. The proposed rule is the result.

The terms on which refrigerator cars are let to shippers vary. Some lessees pay a fixed monthly rental, have their reporting marks on the cars, and the mileage earnings are paid directly to them. Some pay a fixed monthly rental, but the cars bear the reporting marks of the lessors, who collect the mileage earnings and in turn remit same to the lessees. Both forms of contract are hereinafter referred to as leases. Some shippers have cars assigned exclusively to their service that carry reporting marks of the owners. The mileage earnings are paid to such owners. If such earnings exceed a specified amount, the excess is paid to the shippers. The shippers are under no obligation to pay anything for the use of the cars and do not guarantee any mileage. Such contracts are hereinafter referred to as rental contracts, and the cars obtained thereunder as rented cars. The other form of contract in general use is similar to the rental contract, the only difference being that the owner of the car keeps all the mileage earnings. Cars obtained under the latter form of contract are hereinafter referred to as assigned cars.

The railroad-controlled lines generally did not indulge in the practice of leasing, renting, or assigning cars to shippers until about 1928. They had entered into contracts with various railroads under which they were obligated to furnish refrigerator cars in sufficient number to take care of the needs of all shippers served by such railroads. Certain private-car lines also maintained similar contractual relations with other railroads. Other private-

car lines were leasing, renting, or assigning cars to shippers served by such railroads, and the car lines which were under contracts to supply all necessary cars to shippers served by such railroads, as a matter of self-protection, adopted similar practices, not only with respect to shippers served by the railroads with which they had contracts, but with shippers located on other railroads. Consequently, we now find private and railroad-controlled lines bidding against one another to place cars in the exclusive service of shippers on or off the lines of railroads with which they have contracts. The competition is keen, resulting in the cutting of rentals and intensive solicitation of shippers. The most fertile field is shippers who have a fairly regular volume of traffic the year round, such as dealers in dairy products, canned goods, and candy. By leasing or renting only enough cars to take care of their assured traffic, leaving the carriers to furnish cars to move the remainder, they are able to keep their cars moving most of the time, and the mileage earnings usually exceed the compensation paid the car owners by substantial amounts. Shippers' advertisements are painted by the car companies on cars furnished under all forms of contract. Such advertising is valuable to the shippers and, together with other alleged advantages hereinafter mentioned, derived from the use of private cars, are held out as an inducement to shippers to use assigned cars, and in addition to monetary benefits are also held out to the users of leased and rented cars.

The contracts are usually for one to five years, but some are for longer periods, and some for one

year, to continue until canceled. As far as can be determined from the record, rental contracts are not made by certain railroad-controlled lines or by some of the private-car lines. Except the monthly consideration for leased cars, shippers are not obligated to make any monetary payments or guaranties to car companies. The car companies repair and maintain the cars, and bear all other expenses involved in their operation, including in most instances, when desired by the shippers, the keeping of records of movements, supplying of information relative thereto to the shippers, preparation and submission to shippers of monthly statements showing mileage earnings on the various railroads, and the collection of such earnings. The shippers in most, if not all, of the rental and assignment contracts, are obligated to use the cars placed in their service in preference to all other cars, to use whenever possible other standard cars of the contracting car lines, and to give preference at all times to the rented or assigned cars for long-haul shipments in order to produce the highest possible mileage earnings for such cars.

The association shows that refrigerator cars owned by the railroads, decreased from 34,906 in 1923 to 24,685 in 1928, and 17,994 in 1933. Other evidence shows that this was due, in part, to the sale or lease of refrigerator cars by the railroads to railroad-controlled and private-car lines. Railroad-controlled refrigerator cars increased from 68,114 in 1923 to 111,649 in 1928, and 115,230 in 1933, making a total of 133,224 cars owned or con-

trolled by carriers in the United States in 1933. During the same period railroad-controlled lines retired 13,116 refrigerator cars and built new or rebuilt 49,557. Refrigerator cars owned by private-car lines increased from 5,162 in 1923 to 12,116 in 1927, and 21,652 in 1932.

The exhibit introduced by the association shows "packers," said to include "Armour Car Line, East Side Packing, Rath Packing, Swift, Cudahy Refrigerator Line, Hormel & Company, Morrell Refrigerator Line, Dold Refrigerator Line, Kingan Refrigerator Line, and Wilson Car Line," as having 15,902 cars in 1923, 19,469 cars in 1928, and 17,852 cars in 1932. Evidence introduced by others, however, indicates that some of the above-named packers do not now own their cars, but lease them from private-car companies. Whether there is any duplication in the cars shown as owned by the packers, and by private-car lines does not appear; but if the cars owned by the private-car lines which have been leased to shippers and are operated under the lessees reporting marks such as the 133 shown in the equipment register as belonging to Geo. A. Hormel & Company, but which are leased from the North American Car Corporation, are not included in the figures given for the private-car lines, the number of cars owned by the car companies is under-stated.

The following table, a reproduction of an exhibit introduced by the association, shows the loadings of dairy products on class I roads, as follows:

	1932	1931	1930	1929	1928	1927	1926	1925	1924	1923
	Cars	Cars	Cars	Cars	Cars	Cars	Cars	Cars	Cars	Cars
Poultry, dressed ¹	23,279	23,916	23,286	23,522	20,468	22,683	22,634	19,704	20,775	19,827
Eggs.....	37,205	50,699	53,358	52,175	56,120	57,876	57,078	52,704	50,935	53,515
Butter.....	45,338	46,203	45,823	44,384	41,148	59,814	58,383	55,201	51,933	45,336
Cheese.....	12,008	13,840	16,876	18,729	19,871					
Total.....	117,830	134,658	139,343	138,810	137,607	140,373	138,095	127,791	123,643	118,678

¹ Dressed poultry is not shown as a separate item in I. C. C. classification prior to 1928. Figures for 1923 to 1927, inclusive, are arrived at upon basis of ratio of dressed to total poultry for the four years 1928 to 1931, inclusive.

A check at all stations originating dairy products on 10 western railroads disclosed that in 1925 31,274 carloads were loaded at 680 stations, and that in 1932 30,879 carloads were loaded at 683 stations.

The association concludes from the above figures that there has been no necessity for an increase in the refrigerator-car supply since 1927. An unsuccessful attempt was made at the hearing to find out from numerous witnesses whether perishable traffic as a whole has increased since 1928. None of the witnesses had any definite information. Some expressed the opinion that such traffic had held its own better than had most other commodities, and others that it had actually increased. None expressed the view that an increase in the supply of refrigerator cars was required to handle it.

A further check made on 7 of the 10 railroads referred to shows that of the carloads moving in 1925, 178 were in private cars. Other checks of car loadings of dairy products were also made. One made on six railroads that owned or obtained their cars from railroad-controlled lines, and which have fully taken care of the shippers' needs for years without calling on private-car lines, shows that 1,131 carloads of dairy products were moved in private cars during May, 1933. Another check made on seven railroads which owned their refrigerator cars directly or through companies they control indicates that shippers at 248 stations were using private and leased cars and that shippers at 540 stations were using railroad-owned and controlled cars. Another made on nine western railroads shows that at

167 stations some shippers were using railroad cars for dairy traffic, while other shippers at the same stations were using private cars. It does not appear whether the same carriers were used in each instance. Cars loaded by the packers heretofore named were not included as private cars in the above checks, and except when otherwise noted are not included when reference herein is made to private cars.

Investigation by the association disclosed that four concerns shipped 4,989 cars of feed, malt, sirup, soap, lard substitutes, starch, sugar, and corn sirup over a period of 3 months for one of the concerns and 6 months for the other three concerns in refrigerator cars between December 1931 and May 1932, inclusive. During the same period the same concerns shipped 4,458 box cars containing those commodities, which would indicate that the box car is satisfactory for the transportation of those commodities, with a possible exception as to some of the feed, as no definite information relative to its character was obtainable from the witnesses. To the extent that refrigerator cars were used for the commodities that did not require protection the same number of box cars, of which there are a surplus, were forced into idleness with added expense to the railroads.

The loaded mileage made by the refrigerator cars was 1,933,177 miles, and the empty mileage was probably about the same, making the total payments for mileage, on that business, for the 6 months, about \$77,327.08.

Most of the railroad witnesses admitted that there is some movement of nonperishable commodities in refrigerator cars over their respective lines, but, almost invariably, they stated that it consisted mostly of merchandise (less-than-carload) traffic moving toward the home of the car, or of carload traffic received in interchange. The vice president in charge of traffic of a carrier operating extensively in western trunk-line and southwestern territories disclaimed knowledge of any movement of nonperishable traffic in refrigerator cars, although he had previously signed a memorandum to the president of that railroad, reading in part as follows:

The East Side Packing Company, which operates 200 refrigerator cars, primarily to move their packinghouse products, has now served notice on us that in the future their purchase of salt from Jefferson Island, La., and Hutchinson, Kans., must be protected exclusively with their refrigerator cars and cars are being delivered to us at St. Louis empty for movement to those points for that purpose. The round-trip mileage paid these people, in this instance, is equal to approximately thirty percent of the revenue earned on the salt.

An exhibit filed subsequent to the hearing shows that this road moved 26 carloads of salt from Kanopolis, Kans., 18 from Hutchinson, and 26 from New Iberia, La., to St. Louis in refrigerator cars for the East Side Packing Company during the

period from February 17, 1931, to October 30, 1931, inclusive. Scattered movements of various non-perishable commodities in refrigerator cars from origins on other roads were also instanced. Practically all of the railroad witnesses testified that such use of refrigerator cars is discouraged, but that, if shippers using private cars load them with nonperishable commodities, they are accepted by the railroads, and many of them testified that, if a shipper insists on the railroad furnishing a refrigerator car for loading with a commodity not considered by the employees as requiring protection, he gets the car. The association's witness testified that he did not know of any railroad, because of competition, that would refuse to accept a carload of traffic that did not require protection because it was loaded in a private refrigerator car. Although advised in the notice of hearing that such information was desired, few witnesses were informed as to, or would divulge, the extent to which, their lines permit the use of refrigerator cars for shipments not requiring that type of equipment. Considering such evidence as we have, the reluctance of witnesses to give specific information, and numerous statements to the effect that the carriers would do anything not prohibited by law to get traffic, the conclusion is inescapable that the use of refrigerator cars for non-perishable traffic is very materially greater than appears definitely from the record.

The association maintains the carriers have always held themselves out to furnish refrigerator

cars to all shippers, except meat packers, several of whom have undertaken for years to take care of their entire requirements, and that it is the carrier's legal duty to furnish such cars; and that they are and must be prepared at all times to do so. It contends that the railroads, through ownership or contracts with railroad-controlled or private-car lines, not only have a sufficient number of cars, but cars of suitable construction, insulation, and size to meet their obligations. This, it claims, is demonstrated by the fact that they have done so in the past when the traffic was as heavy as at present and when they had fewer cars, and the fact that they are now transporting a large volume of perishable traffic of all descriptions, including dairy products, without complaint. Its position is that as a matter of self-protection the railroads must take steps to stop private-car owners from forcing upon them through leasing, renting, and assigning private refrigerator cars to shippers, which displace cars the railroads have provided for the business of such shippers. That practice involves payment of huge sums for mileage, and unnecessary empty hauls and terminal services.

Protestants' evidence—

Two witnesses testified on behalf of the Association of Creamery Butter Manufacturers and the Protective Association of Private Car Users. The witnesses are connected with two corporations dealing in dairy products and were not informed as to the operations of or the use of private cars by any of the other parties. On behalf of said organizations

they proposed a rule, hereinafter referred to as the shippers' rule, approved by the members thereof which they seek to have substituted for the suspended rule.

They contend that the suspended rule is ambiguous, unfairly discriminatory, improper, inappropriate, and destructive.

They contend that paragraphs (a) and (b) are objectionable, for the reasons that many carriers do not have any refrigerator cars, and the supply of those that do is insufficient; that cars lack uniformity as to dimensions and insulation and are frequently of an improper type of construction for the transportation of dairy products; that ordinary refrigerator cars are not in condition for the transportation of dairy freight either because of the absence of floor racks, defective floor-rack structure, or because they have been used for other lading that creates objectionable conditions; and that carriers are not in a position to accept the mandatory provisions of paragraph (a). The witnesses making those assertions had no knowledge regarding the construction, insulation, or condition of the cars owned or furnished by carriers to shippers. One witness said his remarks were not intended to apply to cars owned by private or railroad-controlled car lines and that if such cars were considered as railroad cars he did not know whether the supply is sufficient to meet the demands of all shippers but supposed that so far as the number of cars was concerned the supply would be ample.

A large majority of refrigerator cars furnished to shippers by the carriers are owned by private

or railroad-controlled car companies as is evidenced by the figures heretofore given. The railroad cars vary in size, type, and insulation, but so do the private cars used by the various dairy shippers and in some instances those used by one shipper. The floor rack is an essential part of the standard refrigerator car. The large majority which do not have them are private cars in the service of shippers of canned goods, candy, and probably some few other commodities, who have caused them to be removed. Some of those shippers were represented by the two witnesses raising that objection. The removal of the floor racks by such shippers is one of the conditions complained of by the association.

Paragraph (c) is said to be ambiguous, when considered in connection with other provisions of the rule, in that it would permit the use of private cars when no interchange is necessary. There is no merit to that contention as the use of private cars locally on one line is covered by paragraphs (a) and (b) relative to the furnishing of cars at origin points. The rule must be considered in its entirety.

The carriers by the exception admit their inability to furnish refrigerator cars for the transportation of all commodities of meat-packing companies, and, therefore, intend to permit those companies to continue to use cars acquired by them through ownership or otherwise. The protestants point out that the large packing companies also engage extensively in the dairy business, and that the use of private cars for such traffic would be an inducement to the independent packers scattered

throughout the United States who do not now handle dairy products to acquire cars and engage in that traffic to the further disadvantage of the dairy interests. They further contend that permitting the use of private cars acquired by packers other than by ownership does not prohibit arrangements such as the proposed rule seeks to eliminate, being made by such packers with car lines. It is also contended that the exception of the application of paragraphs (a), (b), and (c) to the packers is unduly preferential of them and unduly prejudicial to other shippers. That question will be considered hereinafter.

Paragraph (d) is said to be in conflict with paragraph (c) in that it makes no reference to cars received in interchange. This contention is without merit.

The shippers would eliminate the words "and will furnish" from paragraph (a) and the first sentence of paragraph (b), and substitute for the word "commodities" in the second sentence of paragraph (b) the words "particular traffic". They propose that paragraph (c) be changed to read as follows:

Carriers will accept empty refrigerator cars intended for loading on their lines only when the shipper has specifically arranged with them for such cars and when all parties have complied with these rules.

Exception: Inasmuch as carriers are not in position to furnish refrigerator cars suitable for the transportation of all commodities

nothing in these rules will prevent the use of refrigerator cars acquired by ownership or otherwise for the handling of commodities requiring protective service as described in Item 1130.

If cars are acquired by means other than ownership, it must be by bona fide lease at definite, reasonable remuneration to the owner and for a period of not less than three years.

They would eliminate paragraphs (e), (f), and (h) and change paragraph (d) by eliminating the words "gift, gratuity or" and defining the word "owner", as used therein, to include a lessee operating cars under his own reporting marks, and under a lease such as is described in the next preceding exception, and which lessee has control of his cars and the routing of his traffic, and insert a provision that no certificate would be required from an owner or lessee using cars exclusively in his own service. No change is suggested in paragraph (g).

The shippers' rule would have no appreciable effect on present practices. A shipper desiring to use private cars irrespective of his interest therein would only have to arrange with the carrier for their acceptance. The evidence is convincing that it would not be difficult for shippers to induce carriers to agree to accept such cars. They are now accepting them and there is no doubt that under such a rule they would continue to do so.

A shipper owning or leasing his cars for a period of three years or more would be permitted to use them without any previous arrangement with the

carriers. The requirement that the remuneration paid by the lessee to the car owner must be reasonable is indefinite. The witness who submitted the shippers' rule regards a reasonable remuneration as one sufficiently low to permit the lessee to derive a substantial monetary benefit from the mileage earnings. Further the approval by us of the proposed exception to paragraph (c) would be to deny to the carriers their undoubted right to furnish cars suitable to transport safely commodities which require protective service. This we may not do.

The two witnesses referred to, and the others for protestants, enumerate many alleged disadvantages in the use of railroad refrigerator cars, and alleged advantages in the use of private cars. It is alleged that railroad cars furnished are of "a hit and miss variety"; that the age, insulation, ice-bunker capacity, and dimensions thereof vary; that they are generally in bad condition in that they are not tight, have poorly repaired or broken floor racks, or none at all, protruding nails and bolts, and, if cleaned at all, are not properly cleaned; that they are frequently furnished after having been previously loaded with onions or other commodities, the odor from which permeates the car and renders it unfit for dairy products; that, in ordering a car, it takes from 10 to 12 hours or longer to get it placed; and that carriers object to shippers routing a car, ordered from one carrier, over the rails of another, with resulting losses of sales to the shippers. The above summation is of general statements unsupported by specific instances given with sufficient

definiteness to enable them to be identified or checked. Some of the witnesses based their statements on alleged experiences which occurred eight or more years ago. As will hereinafter appear, the weight of the evidence does not support these allegations in their entirety.

The advantages claimed in using private cars are uniformity in insulation and ice-bunker capacity; sufficient insulation to give protection to eggs against freezing in the coldest weather, uniformity of temperature in the cars on long hauls, and reduced icing costs; assurance of modern, clean cars in good repair; uniformity in, and selection of, desired dimensions; flexibility of movement; value of advertisements painted on cars; and profits derived from mileage paid by the carriers.

Several reasons, epitomized below; are assigned by protestants as to why the above-mentioned features are deemed not only advantageous but necessary to the prosperity of the dairy and other industries using private cars. Uniformity in insulation and bunker capacity enable the shipper to know how much initial ice is necessary and how many times, if any, shipments must be re-iced en route in all weathers to insure the necessary protection. When railroad cars are furnished, the insulation and ice capacity vary, with the result that a specific amount of ice used in one car with satisfaction, when used in another, fails to properly protect the lading. If the refrigerating qualities are not known, the only safe policy is to ice the car to capacity. The bunker capacity of railroad cars ranges from 5,000

to 10,500 pounds. Although a car with a 5,000-pound capacity may meet all requirements, if one of 10,500-pound capacity is furnished by the railroad, it is frequently, as a measure of safety, iced to 10,500 pounds, thus unnecessarily increasing the ice cost. The experience of the Pacific Fruit Express is not in accordance with this statement.

The sufficiency of insulation to protect eggs against freezing in all weathers was stressed by only one protestant, a shipper of eggs from the Northwest to New York, whose cars were specifically built for it by the North American Car Corporation. In contracting for private cars, a shipper is enabled to select cars that have been recently constructed or rebuilt, and knows that the refrigerating qualities thereof have not been affected by deterioration or abuse. Cleanliness of cars is assured when used by only one shipper and for only one class of traffic. Cars obtained under contract are kept in good repair at all times by the owning car companies. Therefore, the expense of a careful inspection by an experienced man, which is said to be necessary before it is safe to use a railroad car, is eliminated, and delays due to the removal of unsatisfactory cars and their replacement by others are avoided. A shipper using cars of uniform size knows the best method of loading them, so as to prevent shifting, with a minimum amount of bracing, and can use unskilled laborers satisfactory for that work. The laborers, having learned how to load one car, are enabled to load the others in like manner without experimentation, so

that labor costs are thus minimized. Private cars may be selected that will permit loading of package goods without any waste of space at the sides and with a minimum amount of such unoccupied space between the tiers at the doors, resulting in material savings in both materials and labor in bracing. Some shippers maintain that if the proper cars are selected there is no necessity for any bracing.

Excluding the packing industry, shippers of dairy products are the largest users of private refrigerator cars. Representatives of seven shippers of dairy products presented evidence in opposition to the proposed rule. They all contend that cars furnished by the railroads are not satisfactory for the transportation of dairy products for one or more reasons above stated, and that the use of private cars has reduced claims for damages to a minimum and has held the traffic to the carriers' rails. They either refused or failed to file copies of their contracts with the car companies.

The Fairmont Creamery Company stresses the contention that there is a material saving in expense and no shifting of lading, when private cars are used, because of their uniformity in size. The maximum amount of initial ice used by this concern is 4,000 pounds, and the saving in the cost of ice is said to be about \$4 per car. It ships eggs in straight carloads and in mixed carloads with other dairy products. About 35 to 50 per cent of its entire tonnage now moves in mixed carloads. The proportions of the several products in the cars vary.

A witness for one of the other dairy shippers tes-

tified that a standard egg crate measures 36 by 12.125 inches with variations up to 0.5 inch. Whether the boxes or crates in which butter, cheese, and dressed poultry are shipped are standardized does not appear of record, but those in which each of the products is shipped differ in size from those used for the others. Even if all of protestant's cars were the same size, which hereinafter appears not to be a fact, it is not clear, insofar at least as the mixed carloads are concerned, how the alleged saving in loading and blocking costs is accomplished or how the different cars can be loaded alike.

The Fairmont Creamery Company's plants at Grand Island and Omaha, Nebr., are on the tracks of the Union Pacific. It leases about 200 cars, 30 from the National Car Company, 30 or 35 from the North American Car Corporation, and the others from the North Western Refrigerator Line Company and the General American Tank Car Corporation or its subsidiaries. The equipment register shows that in January 1932 the Fairmont Creamery Company was operating 165 private cars; 120 of them have basket-type bunkers with a crushed-ice capacity of 9,700 pounds and five brine tanks with a crushed-ice capacity of 5,440 pounds. The 125 cars referred to are 32 feet 9.75 inches long and 8 feet 4.75 inches wide. Fifteen cars have basket-type bunkers with a crushed-ice capacity of 9,800 pounds and are 33 feet 10 inches long by 8 feet 2 inches wide. Twenty-five have brine tanks with a crushed-ice capacity of 5,440 pounds and are 30 feet 6 inches long by 8 feet 3.75 inches wide. Eighty-five of the

cars in its service January 1, 1933, were built in 1925 and 30 in 1922. The witness at the hearing agreed to file a statement showing the numbers of the cars leased by it and the dates they were built or rebuilt but has failed to do so. Consequently, more accurate or detailed data as to the size of its cars and their ice capacity are not available. If standard crates 26 by 12.125 inches were loaded eight wide, there would remain unoccupied a space of 3.75 inches in the cars 8 feet 4.75 inches wide, and 2.75 inches in those 8 feet 3.75 inches wide. The witness testified that his company needs cars 32 feet 8 or 10 inches in length and that cars 33 feet 0.5 inch, or 30 feet 6 inches, are not as desirable as those they now use, because they do not load as compactly, and because it would be necessary to load a 30-foot 6-inch car one tier higher. A 32-foot-8-inch car will take fifteen 26-inch crates lengthwise with 2 inches over. The 33-foot 0.25-inch car will take 15 crates with 6 inches over. The 33-foot 10-inch car will take 15 crates with 16 inches over, and the 30-foot 6-inch car will take 14 crates with 2 inches over. The usual load is said to be 400 crates. If loaded eight crates wide and three tiers high there would be a top load of 40 crates, if loaded 15 crates lengthwise, and 64 crates if loaded 14 crates lengthwise.

It is this protestant's present policy, when its commitments will permit, to lease cars from carrier-controlled car lines or private-car lines which have contracts with the railroads over which its shipments move. The same car lines would furnish it

with cars were the use of private cars stopped. It has recently endeavored to obtain enough leased cars to take care of its normal needs, so that it will not have to call on the carriers for cars except during spurts or peak movements such as for the Thanksgiving and holiday trade. It uses only two or three railroad cars a month.

The witness admitted he knew nothing about the type, condition, or suitability of cars now furnished for dairy products to shippers depending on the railroads for cars. The extent of his knowledge as to conditions since 1924 is that some carriers own or lease large vegetable cars, and have some old cars, and several personal experiences he had comparatively recently with cars placed by the railroads for his loading. On one occasion he had to have three cars placed before he obtained one suitable for dairy products. In the spring of 1932, protestant intended to use railroad cars for shipments from Moorhead, Minn., and Devils Lake, N. Dak., and did ship in 15 or 20 such cars but the lading was damaged upon arrival at Duluth, Minn.

Protestant pays \$45 and \$50 per car per month for its leased cars and receives mileage earnings of approximately \$32.50 per car per month in excess thereof, a profit of \$6,500 per month or \$78,000 per year. It says it must have the monetary compensation derived from mileage earnings as an offset to the lower truck rates and that reductions in rail rates would not be sufficient to hold the traffic to the railroads. It describes the establishment of truck-competitive rates as "vicious and unsatis-

factory" and says "it has a tendency to disturb the rate relation between commerce and rates." As an illustration the witness referred to a proposal of the carriers to reduce the rate from the Missouri River to Chicago from 69 cents to 30 cents. He says such a reduction would have the effect of bringing origin prices more nearly to the Chicago market prices and that, as a portion of the production within the territory where the origin prices would be increased would not be marketed at Chicago, the dairy shippers (presumably meaning the middlemen) would be compelled to pay the unaffected rail rate to destinations to which competitive rates were not established, in addition to the higher origin price.

The witness admits that the railroads, either by ownership or lease, have cars suitable and satisfactory for dairy loading and that they can operate and condition them as well as the private and railroad-controlled car lines. He says, however, if his firm is deprived of the use of private cars and the cars furnished by the railroads are clean, in good condition, and identical otherwise with its private cars its traffic nevertheless will be given to trucks.

The DeSoto Creamery and Produce Company ships dairy products from its main plant at Minneapolis, Minn., and branches at four other points in Minnesota, two in North Dakota, and three in South Dakota. The plants in Minnesota and North Dakota are on the Great Northern and Northern Pacific and those in South Dakota on the line of the Chicago, Milwaukee, St. Paul & Pacific. The

branches ship in carload and less-than-carload lots to the main plant and eastern destinations. The main plant ships principally to eastern destinations. For about two years this company has leased 20 cars from the Union Refrigerator Transit Company. It refused to tell the amount it pays for the cars or to furnish a copy of its lease. The amount of profit it makes in mileage earnings cannot be determined. The leased cars are 33 feet long by 8 feet 4.375 inches wide and have a crushed-ice capacity of 9,200 pounds.

The Omaha Cold Storage Company is interested principally in the shipment of dairy products within and from the State of Nebraska. It has used private cars for about 10 years. About 8 or 10 months prior to the hearings, protestant became convinced that brine-tank cars were preferable for the movement of dairy products, and leased 55 such cars from the North Western Refrigerator Line for a period of five years at a fixed monthly compensation. The amount paid is not shown. The mileage earnings are collected by the car company and the entire amount thereof turned over to the protestant. Twelve of the leased cars are 33 feet 2.75 inches and 43 are 32 feet 9.375 inches long by 8 feet 4.375 inches wide. Prior to the leasing of the brine-tank cars it used 47 ordinary refrigerator cars assigned to it by the Union Refrigerator Transit Company.

The Jerpe Commission Company ships dairy products from points in Nebraska to New York. Prior to August 1932, it used 65 assigned private

cars. It desired cars with an ice capacity not to exceed 6,000 pounds, and, consequently, leased 35 cars from the North Western Refrigerator Line Company and 15 from the Dairy Shippers Dispatch at a fixed monthly rental which it refused to disclose. Ten of the leased cars have brine tanks. The witness stated that 10 of the cars have an ice capacity of 5,000, 10 of approximately 8,000 pounds, and the others 6,000 pounds, but that the car company agreed to reduce the ice capacity of those exceeding 6,000 pounds to that amount. The Equipment Register shows that as of July 1933 seven cars were 33 feet 2.75 inches long by 8 feet 4.375 inches wide and that 13 were 32 feet 9.375 inches long by 8 feet 4.375 inches wide.

The witness admits that the leased cars will not take care of its peak movements and explains that the difference between the number of cars previously assigned and those now leased is probably due to the fact that it had too many cars when they were on the assigned basis and that its business has fallen off. The evidence indicates that it is unusual for a private-car line to assign any more cars to a shipper than he can keep actively in service. In addition to the reasons assigned by other witnesses why the proposed rule should not be allowed to become effective the protestant points out that seven terminal railroads are not parties to the tariff and that there is nothing to prevent the use of private cars for shipments originating on their lines.

The Seymour Packing Company, with headquarters at Topeka, Kans., has 13 branch houses in that State. It ships approximately 2,000 carloads of eggs, frozen eggs in cans, and dressed poultry per year to destinations throughout the entire United States. Prior to 1927 protestant used railroad cars. From 1927 to 1930 at its request the railroad furnished cars obtained from the North American Car Corporation. Its experience showed that the latter were better than the general run of cars previously supplied by the railroads. In June 1932, it leased 40 cars from the North American Car Corporation for a period of 10 years at \$50 per month. The leased cars have an ice capacity of about 9,000 to 9,600 pounds. It contends that the smaller ice capacity of its private cars results in a saving in initial icing and in icing in transit. Its shipments are iced twice en route, with an alleged saving of \$4 on each re-icing. Egg crates when placed in storage frequently warp so as to require an additional space of from 2 to 2.75 inches in which to load eight crates wide in a car. Therefore, a car less than 8 feet 4.75 inches is said to be unsatisfactory for such traffic.

Priebe & Sons are dealers in dairy products, and have 52 packing plants in Kansas, Illinois, Iowa, Indiana, South Dakota, Nebraska, Wisconsin, and Minnesota. Because it deemed railroad cars unsuitable for the transportation of dairy products, the concern induced the North Western Refrigerator Line Company to build for its use 140 cars, 32 feet 9.375 inches long by 8 feet 4.75 inches wide, accord-

ing to agreed specifications. It is alleged that these cars were designed to save bracing, permit economical loading, afford transportation without damage, and to materially reduce icing bills. Protestant leases cars, sufficient to take care of only 75 per cent of its shipments, at a fixed amount per month which it refused to disclose. It admitted that the mileage earnings exceed the amounts paid the car owners. This protestant, like others, states that were it prohibited from using private cars its traffic, or a large proportion thereof, would move by truck.

The Beatrice Creamery Company was probably one of the pioneers in the use of private cars for dairy products. It has been using them since 1924. It originally owned its own cars but sold them because of difficulties encountered in operation. It now uses 80 cars assigned to its service by the Dairy Shippers Dispatch. It also has four leased cars for which it pays a fixed rental which is not disclosed. This protestant, like others, stresses the advantage of having cars of uniform size, but states that its assigned cars vary in length if not in width. The Equipment Register shows that the cars owned by the Dairy Shippers Dispatch are from 30 feet 6 inches in length to 30 feet 10 inches in length, and from 8 feet 1 inch to 8 feet 4 inches in width.

Washington Cooperative Egg and Poultry Association is an organization of 14,000 farmers. It has 17 branch houses in the State of Washington and 10 feed mills. Its principal market is New York. About 85 percent of its shipments travel 3,200 miles

or more. It loads 600 cases of eggs, averaging about 31,800 pounds to the car, instead of 400 cases generally loaded in western trunk-line territory.

Its plants are served by the Chicago, Milwaukee, St. Paul & Pacific, Great Northern, and the Union Pacific. Few shipments are moved over the Union Pacific, because that carrier refuses to accept private cars. Considerable testimony was given to show that protestant's private cars are far superior to any of the railroad or railroad-controlled cars in that they protect the shipments against freezing irrespective of the temperature, and in summer maintain a uniform low temperature with a minimum meltage of ice, while the railroad and railroad-controlled cars totally fail in both particulars. It claims that a uniform temperature of 40° should be maintained for the 11 days the eggs are in transit.

Because of difficulties and losses due to deterioration that it suffered when using railroad cars, it induced the North American Car Corporation in 1927 to build 150 cars, 33 feet 4 inches long by 8 feet 2.5 inches wide, with 3 inches of insulation at the sides and top and 2.5 inches in the floor; to install permanent racks extending 2 inches from the bunkers and 1.5 inches from the sides of the car, and to assign such cars to its service. The car is intended to permit loading of 15 cases lengthwise and 8 wide. The eggs are loaded from the ends towards the middle of the car and a V-shaped wedge is placed between the crates at the doors. The wedge is furnished by the carrier, but it was stated that a pro-

posal was being considered to charge the shipper \$2.50 per car for that bracing.

Originally all of the mileage earnings went to the car company, but in 1931 the protestant, learning that other shippers were making money out of private cars, secured a contract under which it was to receive all mileage earnings in excess of an agreed amount. The witness refused to state the amount, but acknowledged that in 1931 payments to it by the car company averaged \$18.35 per car per month, and in 1932 were \$21.27 per car per month. The witness stated that if the association is deprived of the profits derived from mileage earnings it would consider sending as much of its traffic as possible by water.

The association also uses 40 assigned cars obtained from the Union Refrigerator Transit Company. These cars were remodeled in 1927 and are said to be satisfactory.

Packers—

George A. Hormel & Company, packers at Austin, Minn., was the only firm engaged in the meat-packing business that presented testimony in opposition to the proposed rule. Its plant is served by the Chicago, Milwaukee, St. Paul & Pacific and the Chicago Great Western. It ships fresh meat and packing-house products in private brine-tank cars, leased at \$50 per month from the North American Car Corporation. Most of the cars are equipped with beef rails. It states that cars furnished by the railroads are not suitable for its products and that,

therefore, it is necessary for it to use leased cars. In addition to the brine-tank cars it uses 30 mechanical-refrigerator cars. The evidence does not show the profit derived from the brine-tank cars, but the witness stated that the cost of using leased cars and the mechanical refrigerators, which includes refrigeration during the last 10 years, exceeded the amount received in mileage by \$24,690.60.

Canned goods—

Stockley Brothers & Company and associations of canners in Wisconsin and Minnesota were the only shippers of canned goods that presented evidence. Edible canned goods are listed in item 1130-D of the perishable protective tariff as articles that require protection against cold, and as not requiring ventilation. It is generally acknowledged that in cold weather some protection against freezing is necessary. Refrigerator cars answer the purpose. In warm weather, protection of the contents of the cans is not required, but the use of refrigerator cars the year around has become quite general for the purpose of preventing rusting of the cans and discoloration of labels resulting from condensation of moisture due to sudden changes in temperature. One witness stated that a change of 2.5° in 30 minutes is sufficient to cause such damage, but was unable to explain why canned goods stacked in warehouses are not similarly affected. A large volume of canned goods now moves in box cars, and it seems to be the concensus of canned goods shippers and the view of some of the railroad witnesses that

the exclusive use of refrigerator cars materially reduces claims for damage to shipments of this description. Cars with the floor racks removed cannot be used for traffic requiring refrigeration, but as canned goods do not require such protection it is a common practice² for shippers thereof using private cars, to remove the floor racks from the cars. They thus save the expense of handling the racks when cleaning the cars and obtain an even floor without openings.

There is a substantial standardization of cans, but frequently one commodity is packed in cans of two or more sizes and different commodities in cans of varying sizes. All cartons or boxes contain the same number of cans, however, so that the dimensions of the boxes vary with the size of the cans. Shipments are usually in mixed carloads, yet the witness, like the shippers of dairy products, and for the same reasons, stressed the desirability of cars of uniform dimensions.

Stokley Brothers & Company are growers and canners of fresh vegetables. Van Camp, Incorporated, a subsidiary of Stokley Brothers & Company, is a canner of vegetables. The latter company has farms covering 60,000 acres on which they raise fresh vegetables that are shipped to their canning plants located in Wisconsin, Indiana, Delaware, and Tennessee. The only movements of fresh vegetables shown are those of carrots under refrigeration from east Tennessee to Wisconsin and cabbage from Wisconsin to Indiana. When fresh vegetables are ship-

ped, the floor racks are retained in the cars, but when canned goods are loaded the racks are removed. About one fourth of protestant's traffic moves to the Pacific coast and contiguous territory, one fourth to the Southwest, one fourth to Central Freight Association territory, and the remainder to western and eastern trunk-line territories. It has 200 assigned cars obtained from the North Western Refrigerator Line Company.

The witness stated that it is immaterial to his company whether it uses private or railroad cars, provided the cars furnished by the railroads are in good condition, properly insulated, and uniform in size. Its assigned cars are painted with its advertisements, but it considers such advertising of little value and would not object to its prohibition.

The Southern, which serves its plant in Tennessee, objects to the use of private cars. During the summer, shipments therefrom are made in box cars. Claims for damages on shipments moving from that plant are eight times greater than those from all of the plants at which private refrigerator cars are used.

Wisconsin Canneries Association is an organization of operators of 120 canning plants in Wisconsin. There are 153 plants in that State. The normal production of its members is about 14,000,000 cases per year. About one half or two thirds of its traffic moves in excess of 250 or 300 miles to destinations east of Chicago. The heavy movement is between January 1 and July 15. The witness stated that

refrigerator cars are not necessary for the transportation of its products, but that they are desirable especially in the fall, winter, and spring, and that shippers and carriers generally insist on their use for the reasons hereinbefore stated. He stated that box cars are further objectionable in that they are generally dirty, contain protruding nails, retain injurious odors, cause unnecessary claims against the railroads, and prevent the goods reaching destination in first-class condition. About 10,000 to 40,000 carloads per year move out of Wisconsin, approximately 25 percent of which is in assigned cars with the shippers' advertisements painted thereon. The assigned cars are obtained from the same car company that furnishes the cars used by the railroad which would otherwise furnish cars to protestant. The only advantage derived from the use of private cars is the advertising stenciled thereon. There is a substantial movement in box cars, but after September 15 the large majority of the traffic moves in refrigerator cars.

Minnesota Cannery Association is an unincorporated association of 10 or 11 operators of canning plants in Minnesota. Its annual pack of corn and peas is about 3,500,000 cases. It ships to all parts of the United States and to the same destinations as does the Wisconsin Association. About five or six of the Minnesota plants use private cars. The witness stated he was not definitely informed as to the terms on which the cars were acquired, but he believed that one of the shippers leased cars for a

monthly rental of \$45 per month and that the others used assigned cars. He stated that none of the members of the association desired to make a profit from mileage earnings, that the only inducement to them to use private cars is the advertising thereon, and that if that were prohibited the use of the private car, so far as his principals are concerned, would be discontinued.

Candy—

The Curtis Candy Company was the only candy shipper that presented testimony in opposition to the proposed rule. It ships 1-cent and 5-cent candy bars from three plants in Chicago to destinations in all sections of the United States both in box and refrigerator cars. Refrigerator cars do not move under ice. When refrigerator cars are used, the floor racks are removed, because it is stated that uneven slats and the spaces between them damage the cartons and contents. The witness, like the dairy and canned-goods shippers, stresses the desirability of having cars of one size. Its products are packed in 15 or 20 different sized cartons. It admits that few, if any, cars contain candy of only one kind or cartons of one size. As a general rule the number of cartons of each size varies in every carload. Most of its carload shipments consist of consignments for from 15 to 20 customers usually billed to a warehousing company for distribution. About one third of its output moves in assigned cars obtained from the Northern American Car Corporation. It considers advertising on the cars valuable and says

that were it discontinued its traffic would probably be given to the trucks.

Private-Car Line Protestants

The North Western Refrigerator Line Company, Western Refrigerator Line, and North American Car Corporation are the only car lines, either private or railroad controlled, that presented testimony in opposition to the proposed rule.

The North Western Refrigerator Line Company and the Western Refrigerator Line are corporations organized November 19, 1925, and in 1929, respectively. The witness is president of both companies. The investment in those companies is approximately \$10,000,000, one half of which is owned by small investors. The witness alleges that should the proposed rule become effective it would limit the activities of private lines so that "the initiative development of better instrumentalities would be forestalled, the capital invested destroyed, contractual relationships interfered with, and service interfered with to the detriment of future foodstuffs of the United States." The private-car lines have been instrumental in all advances made in specialized equipment and the railroads have adopted such equipment only after its practicability has been fully established by the private lines. It is also alleged that the private-car lines are an absolute necessity, as without them the commerce of the country could not be handled, and that the use of their cars is profitable to the railroads, since they could not maintain sufficient cars to handle the traffic at anywhere

near the present cost of 2 cents per mile plus such additional charges as the private-car lines receive for special services.

The witness urges that there is no such thing as a refrigerator car suitable for general service, that it is necessary that cars be adapted in construction to the commodities to be transported, the territories in which they are to be used, lengths of haul, and, in size, to the commercial units of the various commodities. The Western Refrigerator Line owns 498 cars, all of which are leased to the Green Bay & Western and its subsidiaries. The witness states that those cars are used in general service, except that the floor racks have been removed for the transportation of canned goods, canned sauerkraut, and one or two other similar package goods. The witness explains the seeming contradiction by the statement that there is not a very wide variety of commodities originated on the Green Bay & Western, and that practically no dairy products, other than cheese, originate thereon. The traffic manager of the Green Bay & Western testified that it originates a large quantity of dairy products and that the shipments thereof from stations on its line have increased to a remarkable extent because of the establishment of new industries. He testified that the cars leased by his line are suitable for all kinds of traffic, are of good construction and maintained in firstclass condition at all times, and that the shippers are entirely satisfied with their condition and the service rendered.

The North Western Refrigerator Line Company has 3,100 refrigerator cars, 2,378 of which are leased to the Chicago & North Western and the Chicago, St. Paul, Minneapolis & Omaha, hereinafter referred to jointly as the Chicago & North Western. The witness states that this company can furnish all cars necessary to take care of all perishable commodities originating on the Chicago & North Western. The car company cleans the cars furnished by the carrier, and these cars are all thoroughly inspected and in clean and suitable condition for the transportation of the commodities for which they are ordered when placed by the carrier.

The refrigerator line has 121 contracts with shippers for leased or assigned cars. It has 36 leases for a total of 459 cars at from \$37.50 to \$50 per car averaging \$40.69 per car per month. There are 120 cars on the assigned basis. The North Western Refrigerator Line Company has only supplied shippers with private cars since 1930, but since that date it has furnished them to shippers, not only on lines other than the Chicago & North Western, but also on that line. It says it was forced to take action because other car lines were doing so. It says that if it could keep other car lines from leasing cars to shippers on the Chicago & North Western the demands of that carrier would require all the cars the car line now owns. The witness states that in normal times he would favor a rule prohibiting the leasing or assigning cars to

private shippers; but that during the last three or four years he would not have favored such a rule, because the income derived from dealing directly with the shippers has been acceptable if not profitable.

The witness states that the principal objection he has to the proposed rule is that it is discriminatory. He is not objecting to it on the ground that it is unduly preferential of the packing industry or unduly prejudicial to the dairy interests, but his allegation of discrimination is based on the theory that it gives one car owner a preference (presumably meaning the packers) not enjoyed by others. He states that if that were eliminated he would approve the rule. Sections 2 or 3 of the Interstate Commerce Act prohibits undue preference or prejudice and unjust discrimination between shippers, and are not intended to apply to contracts made by carriers with parties who are not shippers for the furnishing of equipment.

North American Car Corporation owns or controls 2,200 refrigerator cars. It has a joint contract with the New York, Chicago and St. Louis and the Delaware, Lackawanna & Western for 299 brine-tank cars built especially for the transportation of dairy products, and contracts with about 50 shippers. Approximately 20 percent of the latter are for assigned cars and the others for leased and rented cars. All of its cars are either leased to the two carriers named or to shippers, or are assigned to the service of shippers, except 500 which were idle at the time of the hearing. The

testimony of this protestant is of the same general character as that of the witness for the other two protesting car lines.

Protesting Carriers

A committee of six officials of their traffic departments was selected by the protesting railroads to present testimony in opposition to the proposed rule. The testimony of all of these witnesses is along the same general lines, and that part thereof which deals with the necessity for, and advantages derived from, the use of private cars follows closely that of the witnesses for the protesting shippers. The testimony of the chairman of the committee is fairly representative of that of the other members. It was concurred in by them although they were not all in accordance with it in every particular. Only the testimony of the chairman will be reviewed at length herein, and only that part of the testimony of the others which brings out facts relating particularly to the respective roads by which they are employed, or which differs from that of the chairman of the committee, will be discussed.

The vice president in charge of traffic of the Chicago & North Western was chairman of the committee referred to. He shows that the protesting roads originate 80 percent of the dressed poultry, 65 percent of the eggs, and 75 percent of the butter originating in the United States.

He contends that the tariff is ambiguous in that it has been and will be interpreted differently by representatives of different roads and that it is

discriminatory as between dairy shippers and packers in that the packers actually ship the same products in competition with the dairy shippers. Although considerable argumentative testimony was introduced for the purpose of sustaining these contentions, the witness admitted that if all ambiguity, discrimination, and other features of the rule criticised by him were eliminated he would still protest against it just as strenuously on the theory that it will handicap the carriers in competing with trucks and because the shippers of dairy products have advised him that if it goes into effect they will give their traffic to the trucks. Considerable testimony was introduced showing that the trucks have taken a large quantity of this traffic from the rail carriers, and that it is desirable traffic because of its high value and because it moves in packages fairly uniform in size. It is his contention that leased or assigned cars help to hold the traffic to the rails in that they are better suited in size to the loads; that, being confined to one particular traffic, they are generally cleaner and need less preparation and remodeling; that they are available to shippers for movement outbound over any line, and because the profits derived by the shippers from the mileage earnings are a material factor. The witness testified that he saw no objection to a refund by a car owner to a lessee-shipper of mileage earnings in excess of the rental charge upon a leased car; the lessee-shipper thus making a profit from the mileage paid by the carriers under the governing tariff. He

said, further, "I think it is one of our best pulls against the truck." He stated that his ideas as to the necessity for special equipment for the movement of particular commodities had changed since he heard the testimony of shippers. The witness stated he is not a practical car man and that he does not know what cars are suitable for different commodities. He had no idea what proportion of the dairy products loaded on his line moved in private cars or what proportion moved in cars furnished by the railroads, and did not know the construction, condition, size, or any other facts relative to the cars now furnished to shippers by his line or any other carrier. In this particular attention may well be given to the testimony of the president of the North Western Refrigerator Line Company as to the condition and number of the cars now in the service of the Chicago & North Western.

The superintendent of car service of the Chicago & North Western called as a witness testified that the use of private cars entailed additional handling and expense and, from an operating standpoint, disregarding the effect on the procurement of traffic, that the use of private cars should be prohibited. He expressed the view that were it not for competition with other railroads the carriers would insist on the use of their cars. He also testified that the cars furnished by his line are in as good condition and as suitable for the transportation of dairy products, so far as he has been able to ascertain, as the private cars that the shippers are

new using and that the railroad can and does see that they are clean when placed. He estimates that approximately 75 percent of the dairy products originating on the Chicago & North Western is now moving in cars owned and operated by the North Western Refrigerator Line Company.

The Chicago & North Western pays the car company 1.5 cents per mile for the cars it has under lease and 2 cents per mile on cars leased by the car company to shippers. The railroad does not lease any cars to shippers, but it assigns cars to shippers of potatoes during the months from September to April and paints their advertisements thereon. The so-called assigned cars are not restricted entirely to the service of particular shippers. During the other months of the year the cars are put in the general service of the railroad.

During 1932 the Chicago, Rock Island & Pacific originated 1,652 cars of dairy products that moved in private cars and 1,924 that moved in cars owned or leased by packers. A survey made at 35 of the more important dairy-product shipping points on the Rock Island in Iowa, Missouri, Minnesota, South Dakota, Kansas, and Nebraska in March and April 1933 showed that 2,075 carloads moved therefrom by truck which formerly moved by rail. The movement in private equipment or that furnished by the railroad is not shown.

The Rock Island previously owned its own refrigerator cars but recently sold them to the General American Tank Car Corporation and now secures all of its refrigerator cars from that com-

pany on the regular mileage basis. The witness stated he doubts the ability of the General American Tank Car Corporation to furnish suitable cars in sufficient number to take care of the traffic originating on the Rock Island. The witness for the car line testified that it has sufficient and suitable cars to take care of all such traffic. The witness for protestant stated that he had no knowledge of the character or number of cars owned by the General American Tank Car Corporation or furnished by it to the Rock Island. The witness appeared doubtful of the ability of the railroad to see that proper cars are placed for loading, but stated that he thought that today, excepting the shippers now using private cars, the railroad is meeting its obligations in that respect. The witness did not know how many private cars are now being used by shippers located on the lines of the Rock Island.

The superintendent of transportation, another witness, stated that respondent could obtain an ample supply of refrigerator cars from the General American Tank Car Corporation to meet the requirements of shippers on its line; that the cars available are suitable for the transportation of dairy products and are now being used for that purpose; that when shippers of eggs request cars of specified sizes the matter is brought to the attention of the car line, which immediately arranges to comply therewith; and that he would not oppose the rule if it were applicable on all competing railroads.

The Chicago, Milwaukee, St. Paul & Pacific is one of the principal originating roads of dairy

products. It has a contract with the Union Refrigerator Transit Company for approximately 3,000 cars and as many more as may be necessary to supply its needs. The witness states that the Union Refrigerator Transit Company is able to meet all demands made upon the railroad for refrigerator cars. In 1931 it handled 17,814 cars of dairy products. The proportion thereof that moved in private cars is not shown.

The witness makes the novel contention that the use of private cars promotes efficiency in that it obviates the necessity of carriers at competing points each retaining a supply of railroad refrigerator cars on hand to meet the demands of the shippers. He admits that, under the present practice, they maintain cars at such points for the purpose of taking care of shipments in excess of those that can be handled in shippers' private cars. The witness did not know whether the cars furnished the railroad by the car line are in as good condition as the private cars, or whether they are just as suitable for the transportation of dairy products. In fact he had little, if any knowledge of the construction, condition, or any other facts relative to the cars owned by the contracting car company.

An operating department witness for this carrier testified that "the U.R.T. Company furnishes a standard refrigerator car in first-class condition. This car is suitable for the loading of perishable commodities." Asked as to whether the cars of the Union Refrigerator Transit Company leased to

shippers by that car owner were of the same type and design as those leased to the carrier, this witness replied that "most of the cars are of the same type and some are the identical cars that were used in the Milwaukee assignment before they were transferred to shippers assignment by the U.R.T."

The Chicago, Burlington & Quincy owns the Burlington Refrigerator Express Company an independent corporation, which has the same officers as the Fruit Growers Express, Western Fruit Express, and National Car Company. A working arrangement with those companies gives it access to 29,000 refrigerator cars. It can meet the demands of all shippers on its road except those of the packers for brine-tank cars, and the cars furnished by it are suitable for the transportation of dairy products and other perishables. It considers that in some respects the present practice of leasing, renting, and assigning private cars is objectionable and states that some changes should be made, but it opposes the proposed rule through fear that some of the shippers of dairy products may use trucks if the use of private cars is prohibited. It prefers a rule that permits the leasing of cars to shippers, and opposes the rental form of contract under which the shipper is not obligated to pay a fixed amount and receives part of the mileage earnings. According to the witness's theory the propriety of the practice which permits a shipper to receive mileage depends on whether he has his reporting marks on the cars. The witness stated the rule proposed by the shippers is

a step in the right direction. The Northern Pacific owns and operates its own refrigerator cars but it also has a contract with the Northern Refrigerator Car Company to augment its supply when necessary.

Of late years the Northern Pacific has been able to supply all refrigerator cars ordered by the shippers on its lines. The witness stated that it has had no complaints from the shippers of fruits and vegetables, but that it has had complaints from shippers of dairy products relative to the dimensions of the cars furnished. The witness stated that if the railroad insisted on the use of its cars it would not get the dairy traffic because, whether the cars furnished by the railroad are satisfactory or not, the shippers consider that they are not, and that, under present conditions, every inducement must be offered to them to hold their traffic. Protestant takes the position that it has nothing to do with arrangements made by private-car companies and shippers.

The Great Northern owns the Western Fruit Express, an independent corporation, with which it has a contract to furnish all refrigerator cars required by the carrier. The Western Fruit Express owns about 7,000 cars and through this arrangement the Great Northern can meet all requirements of shippers of perishable goods originating thereon. It can furnish cars suitable and in good condition for the safe transportation of all perishables. Notwithstanding this Protestant advocates a continuation of the present practice of

leasing and assigning cars to shippers for the purpose of retaining the dairy traffic to its rails. The witness differs with the chairman of the committee in that he states that his railroad, through its contract with the Western Fruit Express, would be able to furnish different types of cars to meet the requirements of the various commodities, except brine-tank cars, to take care of the meat packers' traffic. The Western Fruit Express does not lease or assign cars to shippers on the Great Northern, but other car lines do. It has cars suitable for transporting eggs from the Pacific Northwest identical with those used by the Washington Cooperative Egg and Poultry Association and protestant accepts private cars for this traffic because of competition. The competition is said to be with water and truck carriers and other railroads, although truck competition is not a material factor.

In Finance Docket No. 10458, division 4 approved May 7, 1934, an application filed by the Great Northern under section 203(a), clause (4), title 2, of the National Industrial Recovery Act, for approval of a loan of \$850,895 to finance the cost of repairing and rebuilding series 49000 to 49999 refrigerator cars. The cars are to be used, among other things, it is stated, to handle approximately 2,000 cars annually of eggs, the principal shipper being shown as the Washington Cooperative Egg & Poultry Association. In view of this action it is difficult to understand the position of the Great Northern in the instant proceeding.

The car company receives the mileage. It also performs the icing and protective services for which it receives the published charges for refrigeration or protective service and any other charges over and above the freight rates provided by the tariffs. If the tariffs do not provide for such charges, the railroad company is required to pay the car company \$5 per loaded car for all traffic originating on the railroad, whether moving in cars belonging to the car company or other refrigerator cars. The \$5 charge is paid whether the cars are operated on a mileage or per diem basis.

It has also a contract with Safety Refrigerator, Incorporated, obligating the car company to furnish cars equipped with automatic refrigerating devices provided the facilities of the car company will permit. The carrier is obligated under that contract to pay 2 cents per mile mileage and to collect and pay to the car line the amount shown in the car line's schedule of charges for protective service on shipments originating at and terminating on its lines. The carrier's tariffs publish a refrigeration charge for the use of such cars and provide that such charges shall accrue to the carrier.

Representatives of the committee, other than the chairman, as well as traffic witnesses for other protesting lines, reluctantly admitted that they joined in the request for suspension largely because their competitors had done so. The Chicago & North Western apparently was the first to protest, and because of competition and traffic pressure others fell into line.

The Green Bay & Western also appeared as a protestant. Neither the Green Bay & Western nor any car line leases cars to shippers on the Green Bay & Western. The latter, however, has assigned cars to the service of 10 or 12 shippers whose advertisements are painted thereon. Protestant objects to the proposed rule only because it prohibits the maintenance of such advertisements on the cars. It says that the advertising causes no extra or additional service, as the shippers to whose service the cars are assigned do not object to them being used for other traffic or by other shippers even when the assignee has to use other cars, and that no shipper on its line objects to using cars with another's advertising thereon.

-Other carriers' testimony.

The Texas & Pacific has a contract with the Northern Refrigerator Car Company for the movement of bananas from New Orleans and with the American Refrigerator Transit Company to supply the necessary cars for the movement of all other perishables. The witness states that the cars furnished are suitable and satisfactory and that the railroad pays only the published mileage rate.

Comparatively few private cars were in use at the time of the hearing. It was said that the practice was just commencing. Some of the private cars are obtained by the shippers from the American Refrigerator Transit Company and are identical with those which would otherwise be furnished by the carrier.

The St. Louis-San Francisco has a contract with the Merchants Dispatch Transit Company obliga-

ting the latter to furnish sufficient cars of suitable type to take care of all shipments of perishables originating on its line, except those of the meat-packing companies. The St. Louis-San Francisco does not undertake to furnish cars for the movement of fresh meat from the packing houses. It states, however, under its contract, it could procure enough cars to move all products shipped by the packing companies, except fresh meat. The refrigerator cars furnished vary slightly in size, but the carrier is generally able to supply cars to meet the requirements of its shippers. The cars, when set for loading, are clean and in good condition. Before being placed they are inspected both by the car company and the railroad company for the purpose of determining whether they are clean and suitable for handling the highest class products and whether the lining, bunkers, hatches, and doors are in good condition.

Private cars are used on the St. Louis-San Francisco principally for the movement of eggs and dressed poultry. Some of these cars are furnished by the Merchants Dispatch and are no different from the cars previously furnished by the railroad to the same shippers. About 400 carloads per year move in private cars and about 4,600 carloads in railroad cars. The return of empty private cars is expedited and, in one or two instances, requests have been made to precool cars while in transit in order to have them available when they reach destination. The witness stated that the precooling of private cars is becoming an important question.

The Minneapolis, St. Paul & Sault Ste. Marie owns 811 refrigerator cars, 600 of which are in active service. It has a contract with the Union Refrigerator Transit Company to furnish 600 cars and such additional cars as may be necessary to take care of the carrier's needs. The railroad controls a sufficiently large supply of refrigerator cars to take care of all shipments originating on its line except brine-tank cars used by the packers and for dressed poultry. During the last few years a number of shippers on the railroad have had advertisements painted on cars which bear the reporting marks of the private-car company that owns them. This practice is increasing. Only one shipper uses leased cars with his reporting marks thereon. A considerable volume of dairy products originates on respondent's line and moves in the cars which it furnishes. These cars are stated to be suitable and complaints are few. Occasionally demands are made for cars of specified sizes. When such requests are made the carrier endeavors to comply with them. Only one of two shippers of canned goods use private cars. There are quite a few instances where shippers request the carrier to move refrigerator cars from their home plants to other stations for loading with canned goods and dairy products. No charge is made for such empty movements and the railroad pays the published mileage rate.

The Wabash and the Missouri Pacific own all the stock of the American Refrigerator Transit Company, which, under contract, furnishes all refrig-

erator cars required by the Wabash. The supply is greatly in excess of the carrier's needs. During the month of May 1933, seven shippers of dairy products and canned goods loaded 128 private cars on the Wabash. During that month there was an average daily surplus of 362 railroad refrigerator cars on its line. On July 28, 1933, there was a surplus of 1,573 American Refrigerator Transit Company cars stored on the rails of the Wabash. During the first 4 months of 1933, the car line named owned an average of 12,290 cars, about 4,000 of which were idle. During 1931, the Wabash paid to 23 users of private refrigerator cars, exclusive of packers, mileage for 6,025,288 miles. In 1932, when there was a materially smaller volume of traffic, it paid 49 users of private refrigerator cars, exclusive of packers, for 17,757,001 miles. The number of private refrigerator cars is constantly increasing. Because of that fact the Wabash has not been able for more than two years to furnish any American Refrigerator Transit cars to some of the largest plants on its line.

The witness states there would be marked economy in operation if American Refrigerator Transit Company cars were used for traffic originating on the Wabash instead of private cars. The figures given above, relative to the use of private cars, do not include traffic from large terminals such as Chicago, St. Louis, Kansas City, and Detroit.

Prior to 1932, potatoes from points of origin on the Wabash were handled in stock or ventilated box

cars. In 1932, 167 carloads moved in refrigerator cars. The shippers maintain that refrigerator cars prevent shrinkage. The carrier complies with the shippers' demands for such cars, although it states that their use results in lighter loads, more cars, more dead weight to handle, and increased terminal costs. The witness stated that there is a material movement of commodities in refrigerator cars throughout the year, which during many months do not require such protection but that the Wabash is compelled to move private refrigerator cars loaded with such nonperishable traffic, or lose it to competing carriers.

The cars in the service of the Wabash are suitable for the transportation of dairy products and all other perishables. A considerable quantity of perishable commodities of all descriptions moves in them without any serious complaints as to the condition or suitability of the cars.

The Missouri Pacific has a contract with the American Refrigerator Transit Company under which the car company is required to furnish refrigerator cars suitable according to competitive standards in sufficient number to enable the carrier to accept with reasonable dispatch and carry all fruits, vegetables, dairy products, and other commodities requiring movement in such cars. The car company is obligated to perform the icing or heating service, for which it receives published tariff charges and, on cars moving under ventilation, the amount provided in the tariffs or, if no such provi-

sion is contained in the tariffs, it receives \$3 per car.

The car line is fully meeting its contractual obligation and is able to furnish cars necessary to transport all perishable traffic originating on the Missouri Pacific, except that of the packers. In 1932 approximately 3,000 carloads of perishable traffic moved in private cars. The witness expressed the opinion that the increased use of private cars did not result in a corresponding decrease in the use of railroad cars because the rail carrier would lose the traffic if the use of the private cars were discontinued, irrespective of whether it furnished suitable cars or cars identical with the private cars.

Prior to June 30, 1933, the Missouri-Kansas-Texas owned 199 refrigerator cars. It leased them to the General American Tank Car Corporation for 10 years. The contract provides that the General American shall keep the cars in repair and pay \$15 per month rental therefor. It also provides that the cars are to be retained in the service of the railroad and that the car company is to receive the mileage earnings and any charges that may be provided in the tariff for the use thereof. It contains no provision for the rebuilding or improvement of the cars, but provides for their withdrawal from service under certain conditions. The car company is obligated to supply cars of its ownership in addition to the cars it leases from the carrier to meet the demands of the railroad to the extent of its ability. At the present time the carrier is using cars leased

from the North American Car Corporation for the transportation of bananas, but it has the option of requiring the General American to supply such cars. The contract also requires that the railroad shall cooperate with the car company to influence the use of the car company's cars by shippers to the extent that it can do so without causing the railroad company to lose traffic through its refusal to accept private cars or cars of other ownership.

The testimony as to the ability of the carrier to furnish cars in sufficient number and suitable for the transportation of perishable commodities originated by it is somewhat contradictory. It is to the effect that, prior to July 30, 1933, it had a sufficient number of suitable cars, except during certain seasons of the year when the movement of some commodities was heavy. It had no contract with any private or carrier-controlled car line to supply the shortage. It depended at such times on cars originating on the lines of other carriers and unloaded on its line. The witnesses also stated that, at the present time, it is in position to meet the demands of shippers for cars of specified sizes or types, but that they are not sure that it could take cars of all perishable traffic offered without the use of private cars. They stated that the carrier originates little perishable traffic other than dairy products, but that the latter is an important item. As will hereinafter appear, it is the testimony of the General American Tank Car Corporation that it can furnish sufficient cars to enable all its contract lines to take care of all de-

mands for the transportation of commodities requiring protection in refrigerator cars, except the traffic of the packers.

Illinois Central

The Illinois Central owns 5,933 refrigerator cars, 525 of which are equipped for service in passenger trains. About 1,300 have been rebuilt in the last two years. The insulation on the rebuilt cars is 2.5 inches and on the others 1.5 inches. There are 2,500 that have adjustable ice racks so that the ice may be carried above the load, giving modified refrigeration. Except during the spring-vegetable movement and the summer-peach movement, the Illinois Central has a substantial surplus of refrigerator cars. For a period of several weeks between March 15 and July 15 it leases 2,000 cars from the Northern Refrigerator Car Company and, during the period from July 15 to March 15 it leases 500 cars to that company for operation on other railroads. It has an ample supply of refrigerator cars on hand at all times to transport all perishable commodities, including dairy products, originated on its line. It does not lease or assign cars to private shippers, but about 10 shippers on its lines use such cars obtained from private-car lines. The Illinois Central was one of the protestants. The witness, the general superintendent of transportation, was not informed as to the reasons the carrier protested, but, as an operating man, stated that he thought the proposed rule was a movement in the right direction, but that it had some defects which he hoped would be rem-

edied as a result of the hearing. He was under the impression that dairy products moved under intensive refrigeration, and, therefore, as the Illinois Central does not own brine-tank cars, that its equipment would be unsatisfactory. He stated, however, that dairy products are moving in the railroad's cars, and that there have been no complaints as to the efficacy of their refrigerating qualities. One or two shippers of eggs complained that the cars were too long and the railroad installed false ends in order to meet their objections.

The St. Louis Southwestern does not own any refrigerator cars and has no contract with any car line to furnish such cars. Practically no dairy products originate on its line and the season during which other perishables originate thereon lasts only about three or four weeks. It obtains the cars necessary for such traffic from its connections.

The Southern Railway owns stock in the Fruit Growers Express and, although it has no formal contract with it, obtains the refrigerator cars necessary to take care of the perishable traffic originating on its line from that car company, under a general understanding, except that the Northern Refrigerator Car Company furnishes some cars for the movement of bananas from New Orleans. No shippers on its line use private cars, and it discourages the use of refrigerator cars for commodities that do not require protection of such equipment. It refused to accept private refrigerator cars from Stockley Brothers & Company for loading with can-

ned goods at its plant in Tennessee. The carrier takes the position that refrigerator cars are not necessary for such traffic during the summer and consistently refuses to furnish them. The carrier is in favor of the suspended rule.

The Delaware, Lackawanna & Western owns 878 refrigerator cars, of which 579 are old and 299 assigned to the banana service out of New York. During the last year the bunkers were removed from 150 of the 579 and these are now used only for transporting ice. The others are in general service. The railroad cars are used for the transportation of dairy products from Buffalo to New York and other eastern points, but there have been complaints by some of the shippers because the cars did not have brine tanks and did not afford sufficient refrigeration. The witness was unable to state whether the cars were or were not suitable for the transportation of dairy products. The Delaware, Lackawanna & Western, and the New York, Chicago & St. Louis Railroad jointly leased 299 brine-tank refrigerator cars from the North American Tank Car Corporation with the view of assigning them particularly to the movement of dairy products from western origins. The New York, Chicago & St. Louis has the exclusive control of the distribution of these cars and, so far as could be ascertained, there is no contract between the two carriers governing how they shall be routed. It was the witness's understanding, however, that the New York, Chicago & St. Louis routes eastbound shipments over the rails

of the Delaware, Lackawanna & Western so far as is practicable. Each carrier pays \$25 per month per car for the leased cars and the mileage earnings are equally divided among them.

The New York, Chicago & St. Louis owns 375 bunker-type refrigerator cars and, as before stated; jointly with the Delaware, Lackawanna & Western, leases 299 brine-tank refrigerator cars from the North American Car Corporation. The carrier also has a contract with the Fruit Growers Express to furnish refrigerator cars for the movement of grapes from stations in the western New York district during the period August 1 to December 31. It pays 2 cents per mile, and allows the latter the published refrigeration charges for the cars moved under ice, and \$2 per car if they move under ventilation. The Fruit Growers Express performs the icing service on the cars furnished by it. Very few private cars are loaded on respondent's line and there is not a material volume of nonperishable traffic loaded into refrigerator cars thereon. In a few instances, such cars are used for the transportation of canned goods during the summer months. When this demand first arose the carrier tried to induce the shipper to use box cars, but they insisted on the use of private cars, and the carrier has acquiesced under the impression that it would otherwise lose the traffic. The number of refrigerator cars owned and leased by the carrier is sufficient to take care of all traffic originating on its lines. The witness considers

the leased cars suitable for the transportation of dairy products.

The Grand Trunk Railway system owns all of the stock of the Chicago, New York and Boston Refrigerator Company, a corporation with which it has a contract to furnish cars for the transportation of butter, condensed milk, cheese, dressed poultry, eggs, and game. While the contract specifically mentions the articles named, the witness stated that the car line furnishes refrigerator cars for the transportation of all of its perishable traffic.

The railway is obligated by the contract to pay the car company "the current rate paid generally by other railroad companies operating from Chicago eastbound to New England and trunk-line territories to similar refrigerator car companies, whether such compensation is on a mileage or per diem basis," except that, under no circumstances, shall the rate exceed 0.75 cent per mile. The car company controls the distribution of the refrigerator cars at and west of Chicago. The railroad is also obligated to pay the car company for all traffic transported over its rails in cars owned, controlled, or operated by the car company, and for all refrigerator traffic "which may be consigned in the cars of the 'car company' although loaded in other refrigerator cars" a commission of 10 percent on all first, second, and third class traffic, and a 7.5-percent commission on all other traffic. The commissions are percentages of the remainder of the transportation charges, after deduction of switching, arbitraries,

lighterage, bridge tolls, terminal, and other charges paid by the railroad. By supplemental agreement dated April 1, 1913, the 10-percent commission was increased to 12.5 percent.

The car company maintains 10 offices and employs 40 men for the solicitation of dairy-products traffic for movement principally from western trunk-line territory over the lines of the Grand Trunk. The commissions referred to above are paid for that service.

The Chicago, New York and Boston Refrigerator Company, prior to June 20, 1932, received a so-called commission from the Lehigh Valley and the Delaware, Lackawanna & Western of 12.5 percent of the gross earnings on butter, eggs, game, dressed poultry, and cheese, and 10 per cent on condensed milk, on all shipments routed over their lines. On June 20, 1932, the carriers notified the car line that they would reduce the said amounts from 12.5 to 11 percent and from 10 to 9 percent.

The witnesses for the Grand Trunk and for the car line testified that the commissions were paid for the solicitation of traffic. It clearly appears, however, that the solicitation did not create any new business, but merely resulted in traffic being diverted from one route to that of another. The Grand Trunk connects with both carriers at Buffalo. The witnesses were unable to explain how the specific amounts of the commissions were arrived at, or how competitive traffic is divided between the contracting railroads. The Lehigh Valley and Delaware, Lacka-

wanna and Western also pay 2 cents per mile mileage while the maximum paid by the Grand Trunk is 0.75 cent per mile.

The Atchison, Topeka & Santa Fe owns sufficient number of refrigerator cars to take care of all perishable commodities originating on its lines, except that its supply of brine-tank cars is limited, and probably it would not have sufficient number of that type to meet requirements. During 1932, 1,943 carloads of dairy products moved in private cars, not including shipments made by packers. A sufficient number of suitable refrigerator cars, in good condition, owned by the railroad, was available for that movement. The carrier does not lease or assign refrigerator cars to shippers on its line, but when they obtain cars from other sources it accedes to the demand that it permit their use. In every instance, where a shipper has obtained private cars, the carrier has objected to their use and unsuccessfully tried to induce him to use railroad equipment. A large proportion of the dairy products originated by it is now moving in railroad cars without complaints from the shippers as to their refrigerating qualities or size.

The Denver & Rio Grande Western owns 180 standard-gage refrigerator cars, but they are largely restricted to local use. It has a contract with the American Refrigerator Transit Company to furnish suitable cars, in good condition, for the transportation of all commodities originating on its line. It transports from 18,000 to 22,000 cars of potatoes,

vegetables, fruits, canned goods, and dairy products a year. Dairy products constitute but a small portion of the total perishable traffic. The carrier has encountered but few demands for cars of specific sizes or types. The shippers on its line are satisfied with its refrigerator cars, which are of modern construction, and have raised no question as to their suitability. No private refrigerator cars are used on its line, except from origins in Utah.

Nye and Nisson, Incorporated, a shipper of eggs from Salt Lake City and Murray, Utah, uses private cars from those origins. It also ships eggs from California to New York. Under tariff restrictions, private cars are not accepted for the movement from California. Railroad owned or controlled refrigerator cars are used. There is a transit privilege which permits storage, grading, and other services at Murray, Utah, for which a transit charge of \$5.85 is provided by tariff. The shipper, however, in many instances, desires the eggs to move through with as little delay as possible at Salt Lake City and Murray. Consequently, it transfers eastbound eggs from railroad cars to private cars. When a private car is not available, the eggs move through from origin to destination in the car in which they were originally loaded, and there is no allegation that they are not safely transported. At the time of hearing there was no tariff authority for the transfer described and no charges are assessed for the stop or the extra switching services necessary to permit the transfer. The witness's explanation for permitting

this illegal practice was that it was an outgrowth of the transit privilege and the desire of the shipper to have the eggs go out in the same train in which they arrive. It would appear, however, that it was directly due to the desire of the shipper to obtain a profit from the use of private cars. Witness for the association testified that a recent check showed that, from August 1931 to and including June 1933, a total of 374 carloads of eggs which had left originating points in California in railroad owned or controlled cars were transferred at Salt Lake City, Ogden, and Murray to cars of private ownership, for movement to eastern destinations. Since the hearing a tariff permitting such transfer has been filed.

The Union Pacific and the Southern Pacific own the entire stock of Pacific Fruit Express Company which supplies them with refrigerator cars. The latter's contracts with the railroads require it to provide and maintain refrigerator cars in good and safe condition and repair, and to furnish an adequate supply of such cars to the carriers for the transportation of all perishable commodities. The car line is required to perform refrigerating and heating services with certain exceptions. The tariff charges for those services are collected by the railroads and paid to the car line. The railroads are obligated to pay 2 cents per loaded and empty car-mile for the use of refrigerator cars during the entire life of the contract, irrespective of whether any change is made in the tariff rate. For cars as-

MICRO CARD

TRADE MARK 

22

39



65



11682

signed to company service such as hauling ice, a rental of \$30 per month is paid.

Pacific Fruit Express has sufficient refrigerator cars to meet all the demands of shippers on its contract lines and these cars are said to be suitable for all perishable commodities, including dairy products which not only move therein for short distances but from the Pacific to the Atlantic coast. The cars are satisfactory to the shippers. While the supply of cars is said to be ample and in excess of present demands it is no greater than is necessary to take care of a volume of traffic equal to that handled before the depression.

The Pacific Fruit Express does not lease or assign cars to private shippers on lines west of El Paso, Tex. The witness did not know whether it placed cars in the exclusive use of shippers east of that point.

The Erie owns 396 refrigerator cars. Seventy-five of them are confined to the banana traffic which moves from New York, principally to Buffalo. It leases 242 of them to the Union Refrigerator Transit Company for \$15 per car per month. The car company is required to maintain these cars. The others are used almost entirely for the hauling of ice. It has a contract with the Union Refrigerator Transit Company under which the latter undertakes to furnish, at 2 cents per mile, all refrigerator cars necessary for the movement of perishable traffic, except bananas originating on its line.

Perishable traffic originating on the Erie consists of seasonable vegetables and fruits, originating at small loading stations, and a small quantity of dairy products, originating at six or seven small stations near Marion, Ohio. The total volume is small. Most of the perishable traffic handled by it is received from connecting lines or switching lines at Chicago or is ex-lake traffic obtained at Buffalo. The Erie furnishes very few refrigerator cars for traffic originating at or received at Chicago. It is not the practice of the switching lines to call on it for cars. They use cars of other carriers or private cars. Shipments from Buffalo move, almost if not entirely, in cars belonging to the packers, or cars obtained under its contract with the Union Refrigerator Transit Company. Private cars are not used for other traffic originating on the Erie, nor are refrigerator cars used to any extent for the movement of nonperishable traffic.

The Pennsylvania owns stock in the Fruit Growers Express with which it has a contract requiring the car company to furnish it with sufficient suitable refrigerator cars for the reasonably prompt acceptance and transportation of all commodities requiring protection. Few private refrigerator cars are loaded on the Pennsylvania, except probably at Buffalo. The witness was not familiar with the conditions there, but stated that there is no doubt but that shippers are leasing or obtaining cars from private sources.

The Baltimore & Ohio also owns stock in the Fruit Growers Express, from which it obtains all its refrigerator equipment. Its contract is identical with that of the Pennsylvania. The witness estimated that, probably, only a few hundred private refrigerator cars per year are loaded on its line, and those principally with dairy products. He says that the perishable commodities originated by it consist mostly of apples, which are seasonable. So far as the witness knew, no canned goods move in refrigerator cars from origins on this line.

It is the practice of the Baltimore & Ohio to waive the payment of demurrage when a car is on the tracks of the consignee and he placards it as belonging to him although the car, at the time it left the point of origin, and during its entire movement, may have been placarded as belonging to the consignor. No investigation is made to determine whether, as a matter of fact, the consignee has any interest in the car. The statement of the consignee or his act in placarding the car is treated as sufficient evidence of ownership.

The New York Central, through a subsidiary, owns all the stock of Merchants Dispatch Incorporated, to which it leases 11,131 refrigerator cars. It has a contract with the car line that requires the latter to furnish any additional refrigerator cars necessary to meet the needs of the carrier. Since 1929, there has been a varying, but appreciable, surplus of Merchants Dispatch cars on the rails of the New York Central. In 1930 the cars on the carrier's tracks, including surplus but excluding

those in shops, averaged 17 miles per day or 34 cents per car, but under the terms of the contract, the New York Central paid the Merchants Dispatch for 60 miles per day per car. Since that time the guaranteed mileage has been reduced from 60 to 50 miles. The witness stated that he is unable to estimate the extent to which the use of private cars has contributed to its leased cars standing idle.

Although the New York Central has a contract with the Merchants Dispatch requiring it to use only cars furnished by that company, it permits the use of private cars by shippers. It alleges that if it did not accept the private cars and place them for loading its competitors would. The cars leased by it are suitable for all traffic, including dairy products, originating on its lines. It moves dairy products from the Lakes in both private and railroad cars and says that it has received no complaints as to the condition of the cars furnished by the railroad or as to their suitability for the safe transportation of such products.

Other Car Lines

The Merchants Dispatch Incorporated, the stock of which is owned by the New York Central through a subsidiary, owns approximately 13,993 refrigerator cars. It has contracts with several carriers to supply them with such cars. It leases and assigns cars to private shippers. It is opposed to the practice, and claims it does so only in order to meet competition of other private and railroad-controlled car lines. Since the hearing, the car

company has filed copies of 34 of its leases, 17 being with shippers for *form* 1 to 90 cars each, totaling 198 cars, at monthly compensations ranging from \$38 to \$42.50 for brine-tank cars, and \$35 to \$60 for standard refrigerator cars. These cars bear the shippers' reporting marks, and the lessees receive all of the mileage earnings. The car line claims that most of its cars that are in the service of private shippers are leased for amounts that are remunerative. Yet it filed an exhibit for the purpose of showing the average cost of ownership of refrigerator cars operated by nine car lines as 2.49 cents per mile. At 2 cents per mile the lessees are receiving a profit over the amount paid the car company.

The car company also has a contract assigning 20 cars to the service of one shipper, 5 to another, and from 350 to 400 to another. The only compensation it receives for those cars is the mileage of 2 cents. The contract for the larger number states that the assignment is for the purpose of avoiding damage to "the general run" of equipment used in fruit and vegetable service. Practically all of the contracts provide for increasing the number of cars specified therein, so that it cannot be determined how many cars it now has in the exclusive service of shippers.

It filed copies of contracts with 14 railroads. They provide that the railroads shall make an annual monthly "forecast or estimate" of the perishable freight traffic that will originate on or beyond their lines for which it is likely Merchants Dispatch

refrigerator cars will be required. They also provide that the Merchants Dispatch will furnish, so far as its facilities will permit, or as near as it reasonably can, cars in sufficient number and cars that are suitable for the transportation of all commodities originating on the contracting railroads. The carriers are obligated to use Merchants Dispatch cars in preference to all others, as far as possible, for all perishable freight originating on their lines or connecting lines for which they furnish the refrigerator cars.

The contracts with the St. Louis-San Francisco, Tennessee Central, and the Akron, Canton & Youngstown provide for the payment of mileage only. The contract with the Bangor & Aroostook calls for the payment of mileage plus \$5 per car. The contracts with the Lewiston & Youngstown Frontier and Northern Indiana provide that the Merchants Dispatch shall perform all the icing services and receive therefor only the tariff charges and, as rental for the cars, \$1.50 per diem, subject to a minimum charge of one day's per diem. The Maine Central pays mileage and \$5 per car except on "cars applied on warm car merchandise schedules" during the period such schedules are operated. The contract with the Pittsburgh and Lake Erie provides that it may use refrigerator cars for non-perishable traffic when the facilities of the Merchants Dispatch permit. It pays a rental of \$1.20 per diem on refrigerator cars in freight service, and guarantees 60 miles per day per car on refrigerator cars in express service. The railroads clean

the cars. The Reading, Lehigh Valley, and Central of New Jersey perform the icing services, yet their contracts call for the payment of mileage, \$12.50 per car on cars moving under ice, and \$5 for each car not under ice, loaded on their lines, or given to their connections for loading and return to them. Cars owned by the carriers, or cars owned by other railroads destined to home lines loaded on the carriers' lines, are exempt from such charges. The latter part of 1932, or the early part of 1933, the so-called service or loading charges were reduced 50 percent. The contract with the Western Maryland provides that the Merchants Dispatch shall perform icing services. It also provides for the payment of mileage, and that Merchants Dispatch shall receive all tariff charges on cars moving under section 2 of the perishable protective tariff and that, on cars not moving under that section, charges equal to the cost of ice at the tariff rate plus \$7.50 per car shall be paid. The Merchants Dispatch is also to receive \$5 per car and the cost of ice delivered in bunkers on all cars originated on the lines of other carriers requiring icing on the Western Maryland. The contract with the Buffalo, Rochester and Pittsburgh provides for the payment of mileage, and that Merchants Dispatch is to perform the icing services, for which it is to receive all tariff charges on shipments moving under section 2 of the perishable protective tariff, \$12.50 plus cost of ice at \$4 per ton delivered in the bunkers on all cars moving under section 4 of the perishable protective tariff, and \$5 per car on all cars

furnished by the Merchants Dispatch moving without ice. It is also to receive \$7.50 per car and a sum equal to the tariff charges under section 2 of the perishable protective tariff on all cars with ice placed on top of the load in the body of the car; \$5 per car on cars originating on other lines requiring icing on the lines of the railroad, and \$5 per car, plus the delivered cost of the ice, on cars originating on the railroad but not furnished by the Merchants Dispatch. In practically all the contracts the mileage rate to be paid is specifically stated to be 2 cents per mile for refrigerator cars in freight service, and 2.5 cents per mile in express service. In one or more of the contracts the amount of mileage to be paid is specified as that provided for in the current tariffs.

The witness testified that the Merchants Dispatch has cars of only two sizes, 36-foot cars that measure about 28 feet 9 inches inside, and 40-foot cars that measure about 33 feet 2 or 3 inches inside. Attention was called to the statements of other witnesses that a 32-foot 9-inch or 10-inch car is necessary to prevent shifting of egg shipments. He stated that his cars are used satisfactorily by the shippers. Considerable dairy products originate on the New York Central and other lines served by the Merchants Dispatch, and its cars move these commodities without complaint, and the witness stated he has no doubt that they are perfectly suitable for such traffic.

The General American Tank Car Corporation and its subsidiaries, the Union Refrigerator Tran-

sit Company, Quaker City Refrigerator Line, and General American Transportation System are under contract to furnish refrigerator cars for the Chicago, Milwaukee, St. Paul & Pacific, the Chicago, Rock Island & Pacific, Chicago Great Western, Erie, Minneapolis, St. Paul & Sault Ste. Marie, the Minneapolis & St. Louis and Missouri-Kansas-Texas, and nine smaller roads connecting with one or more of those named. The contract railroads serve 21 States, reaching from the Pacific Northwest to the Atlantic, and from the Canadian border to the Gulf of Mexico. They have considerable trackage in the Middle West, which is the large producing territory for butter, eggs, poultry, cheese, and packing-house products. The car lines named own over 8,000 cars that were designed for handling dairy products, fruit, vegetables, and other perishables. About 612 of these cars are leased to, and 636 assigned to, the exclusive use of shippers of dairy products, and 3,886, which are suitable for such traffic, are under contract to the railroads. The others are in the service of meat packers.

The witness who heard the testimony given in this case declared that his company can furnish every shipper with the type of car which he stated was required for his business. It is now furnishing, through the railroads, to shippers of dairy products on its contract lines, large and small cars with brine tanks, basket bunkers, divided basket, and plain bunkers. The majority used are of the plain bunker type, practically all of which have an inside loading length of 32 feet 9.375 inches.

Some, for longer hauls, use cars 33 feet 2 to 4 inches in length. The bunker capacities vary from 8,000 to 10,000 pounds, with a few equipped for "stage icing" as low as 4,000 pounds. The witness stated that, up until four or five years ago, comparatively few cars were leased to shippers, and those that were leased were for special needs. The rentals bore a fair relation to the actual cost of ownership. In the past few years, however, there has been keen competition in the leasing of cars to shippers. Because of the extremely competitive conditions, the monthly charges for leased cars have steadily declined until, at the present time, they do not have any relation whatsoever to the cost of ownership. The explanation of the making of unprofitable leases is that it would be fatal for a car company having a railroad contract to let other car companies lease cars to shippers who had formerly used its cars, and thereby destroy the value of the railroad contract by taking the business of the shippers on whom the car company must depend for mileage revenues. The witness stated that, under such conditions, it is better, from a financial viewpoint, to accept a lease which will give the car owner something to apply on costs, rather than to have the car remain idle and yield nothing, while interest and depreciation are accruing.

Another factor tending to make leases unprofitable is that lessees lease only enough cars to take care of the cream of their business and then run those cars steadily for long distances, thus increasing maintenance expenses.

These car companies maintain that their ownership costs show that 2 cents per mile barely enables them to maintain a sufficient number of cars and keep them in proper condition only when the movements thereof are rapid and frequent. They contend that, if the private and railroad-controlled car lines are to continue to function effectively, they must have all the mileage earned by the cars owned by them. They take the position that the proper economical function of a car line is to furnish cars to railroads, acting either as their refrigerator-car supply department, or supplementing railroad-owned cars, and that, if their activities were confined to furnishing cars through the railroads only, they could give a specialized refrigerator service meeting all requirements of shippers as to condition and quantity of equipment. They say that present conditions are chaotic and prevent the orderly handling of refrigerator cars. They are in favor of the suspended rule becoming effective.

One witness appeared on behalf of the Fruit Growers Express, National Car Company, Western Fruit Express, and Burlington Refrigerator Express Company. These companies are separate and distinct corporations. The stock of the Fruit Growers Express is owned by several railroads, that of the National Car Company by the Fruit Growers Express, that of the Western Fruit Express by the Great Northern, and that of the Burlington Refrigerator Express by the Chicago, Burlington & Quincy. They are operated by one organization.

The accounts are kept separately but the cars of the several corporations are used in common. The Fruit Growers Express has contracts with some 57 or 58 railroads to furnish them with refrigerator cars. The Western Fruit Express operates only on the lines of the Great Northern and the Burlington Refrigerator Express only on the lines of the Chicago, Burlington & Quincy. Neither the Western Fruit Express nor the Fruit Growers Express lease, rent, or assign cars to private shippers. The Burlington Refrigerator Express leases cars to two or three shippers. The Fruit Growers Express did not desire to lease cars to shippers but, in order to meet the competition of the other car lines indulging in the practice on its contract lines, it organized the National Car Company, which leases and assigns cars to shippers, principally of dairy products. The cars operated by the latter company are mostly brine-tank cars and were obtained from the Fruit Growers Express.

The cars operated by the associated car lines are and have been used for a number of years for the transportation of a large quantity of dairy products and other perishables. They are operated in all sections of the country and transport the traffic in a safe and satisfactory manner. The refrigerating qualities, sizes, and condition of the cars are apparently satisfactory to a large majority of shippers, and the several car companies have a sufficient number of cars to meet all requirements of shippers on their contract lines.

The Fruit Growers Express performs the icing

services on most of the railroads with which it has contracts and other protective services on some of them. The compensation it receives therefor vary. It has different forms of contracts. The two principal kinds are those it designates as fruit-and-vegetable contracts and those represented by the one it has with the Pennsylvania Railroad. Under the first it receives 2 cents a mile and the tariff charges for icing. Under the second it is obligated to ice and/or salt or heat all cars furnished by it and all other refrigerator cars loaded with perishables while on the rails of the carrier. It also cleans and prepares the cars furnished by it. The railroad pays 2 cents a mile and the stated charges for refrigeration or protective service against cold and all charges for the use of refrigerator cars which are specified by the tariffs to be in addition to the freight charges to the extent such charges accrue to the railroad company. When refrigeration or protective service is paid for by shippers or when traffic moves under stated refrigeration charges accruing on other railroads, or where the icing or heater service at destination stop and hold points is paid for by shippers, the railroad pays the car line the tariff charges. If the cost to the car line, including items mentioned in the contract, exceed such tariff charges, the railroad reimburses the car line in the amount of such excess. It also pays 25 cents per car for each car inspected when no ice or heat is furnished, and \$2 for each loaded car handled in interterminal or intraterminal switching without a road haul.

The general manager of the Armour Car Line and assistant to vice president in charge of traffic of Armour and Company appeared on behalf of Armour and Company, Cudahy Packing Company, Kingan & Company, John Morrell & Company, Swift & Company, and Wilson & Company, packers of meats and dealers in packing-house and dairy products. Since the use of refrigerator cars first began, the packers named have undertaken to furnish all such equipment necessary to meet their entire requirements, the peak as well as normal movements. In 1920 they made representations to the American Railway Association that the mileage allowance then in effect was inadequate to enable those packers to earn sufficient to cover the cost of ownership, and that they could not continue to build and maintain a sufficient supply of refrigerator cars to meet their entire requirements unless an allowance of at least 2 cents per mile was granted. An agreement on that basis was reached and submitted to us for approval. Division 2, by reduced rate order no. 735, approved the 2-cent allowance for filing without formal hearing and with the proviso that such approval should not affect any subsequent proceeding. Those packers, because of commitments made by them at the informal consideration of the matter by the division, have felt obligated to us and carriers to maintain, by ownership, or lease, sufficient cars to transport all of their traffic. They feel that they have relieved the carriers from their legal obligation to furnish them with refrigerator equipment, and the carriers

have acted on that theory, for they do not hold themselves out to furnish refrigerator cars to those packers. Those packers' investment in refrigerator cars is about \$44,000,000. It is generally conceded that the railroads, private-car lines, and railroad-controlled car lines do not own sufficient cars of the proper type to safely transport fresh meat, and most of the railroad witnesses express doubt that the railroads and the car lines could furnish the cars necessary to transport the other products shipped by those packers.

A large proportion of the packers' traffic moves in mixed carloads consisting of meat and packing-house and dairy products. Brine-tank cars are required for the safe transportation of fresh meat. The facts and assertions, relative to the packers' businesses, hereinafter set forth, are based on the witness's knowledge of the affairs of Armour and Company. He was not sufficiently acquainted with the details of the other packers' businesses to enable him to speak authoritatively relative thereto, but stated that, from his general experience, he knows that his statements are not only true in regard to Armour and Company's affairs, but are generally true in regard to the other packers. The principal difference is that Armour and Company owns all the refrigerator cars used by it, while Swift & Company and John Morrell & Company, and possibly some of the others, lease cars.

All cars owned by Armour and Company have brine tanks and are built for general service, that is, for the transportation of all commodities which

that concern ships. They are used indiscriminately for the lading at hand, whether it be fresh meat, packing-house or dairy products, dressed poultry, or mixed carloads of those articles. Cars unloaded by it are loaded out again in many instances. That is done wherever possible. The loaded mileage exceeds the empty mileage on practically, if not on all, of the carriers in the country.

If it were necessary for Armour and Company to use its own cars for fresh meats, and mixed carloads containing fresh meat, and depend upon cars furnished by the railroads, assuming that they were able to meet the requirements, for the other products shipped by Armour and Company, it is reasonable to conclude that additional empty mileage would result, and that more switching would be necessary in the removal and placing of cars at its various packing plants, since Armour loads from 200 to 700 cars a day.

The witness has been engaged in the transportation of dairy products since April 1894. He testified that it was "news to him" that an even temperature or intense refrigeration was necessary for the safe transportation of eggs. Armour and Company provides less refrigeration for eggs than for its other traffic and, in winter, ships them without ice. Its cars vary in size. The maximum difference in their length is about 3 feet. Few of its cars will permit the loading of eight crates of eggs across the car. It starts the floor load against one side of the car and loads the crates compactly, leaving a space on the other side. The next tier is started

on the opposite side against the wall and loaded in the same manner. Each tier, therefore, leaves a space between the last crate loaded and the wall of the car on the opposite side from that left by the tier next above it. Nothing is put in those spaces. Usually the crates are loaded against the bunkers, leaving an empty space in the middle of the car which is filled by bracing or blocking. Sometimes the filler is placed next to the bunkers so that the crates meet in the middle of the car. Armour and Company has been loading eggs in that manner for years and shipping them for long distances, such as from Oklahoma to New York City, without damage. When so loaded the lading does not shift.

Tank Cars.

The carriers do not hold themselves out to furnish tank cars to shippers, and do not own or lease sufficient tank cars to enable them to do so. Such tank cars as they control are provided only for the movement of company material, although, in isolated instances, a few may be furnished to shippers.

The Union Tank Car Company owns about 35,000 tank cars, which are used almost exclusively for the movement of petroleum and its products. The cars are leased to shippers at rentals based on size and kind of car and the number of days they are under load. They are operated under the reporting marks of the car company which receives and retains all mileage earnings. The evidence is that an additional charge to the shipper is necessary because mileage earnings are insufficient to cover

cost of ownership. Most of the other evidence introduced at the hearing dealing with tank cars relates to special types such as chemical and milk cars. It also is to the effect that the cost to the shipper exceeds mileage earnings. Answers to the questionnaire show that tank cars are leased to the shippers for fixed amounts per month and that the shippers receive and retain all mileage earnings but they do not show whether the latter exceed the rentals. December 31, 1932, there were approximately 156,244 private tank cars in the United States. We have no evidence as to the large majority of them except such as is contained in the questionnaire. That is not comprehensive enough to warrant a conclusion as to whether abuses, such as we have discussed in connection with private refrigerator cars, attend the use of private tank cars. That such abuses, however, did exist is indicated by the adoption of a code for tank-car service industry in which certain of the practices herein discussed, such as permitting the lessee of cars to profit through the payment of mileage earnings, is declared to be an unfair trade practice.

Stock Cars

The testimony relative to the use of stock cars is meager and indefinite. It indicates that carrier-owned stock cars are being displaced to some extent by private cars. Most of the stock-carrying roads have sufficient cars to meet the requirements of shippers located on their lines, except at large centers where stockyards are maintained. The witnesses were not sufficiently informed to give any

definite information as to whether the carriers could furnish sufficient stock cars to take care of the traffic originating at the latter points. The record leaves the question in doubt with an inference that they could not do so, especially if they were required to furnish cars to take care of the packers' traffic. Most of the large stockyards are served by switching or belt lines which do not ordinarily call on their line-haul connections to furnish stock cars, although they do so when necessary. The source from which the terminal lines procure the stock cars placed by them for loading could not be ascertained. The witnesses were under the impression that the terminal lines own and lease some cars and that a considerable number loaded by them are private cars furnished by the packers or other shippers. Whether the users of private stock cars derive a profit from the mileage earnings or receive some other monetary benefit from the car owners is not shown by the evidence.

Open-Top Cars

Data compiled by the car-service division of the American Railway Association shows that in May 1921 there were in service on the rails of all carriers, 6,609 gondolas, 17,944 hopper cars, and 647 coke cars, or a total of 25,200 open-top private cars. In May 1932 the numbers of the several types were reduced to 1,178 gondolas, 16,319 hoppers, and 134 coke cars, a total of 17,631. The majority of the hopper cars are coal cars. Prior to the hearing in *Assigned Cars for Bituminous Coal Mines*, 80 I.C.C. 520, private coal cars were given to the mine

to which they were assigned. The owner was entitled to the exclusive use of all that he controlled. The use thereof was not affected by distribution rules, except that they were counted against the distributive share of the mines. In order that they might have an ample supply of cars during periods of car shortage it was the practice of mine operators, public utilities, and large industries to own or lease cars. The findings in the case cited require that during periods of car shortage all cars be distributed to mines on a pro rata basis and that every mine on the same division or in the same district shall receive the same pro rata share of the total number of all available cars. They require that cars assigned or consigned to specific mines shall be counted and charged against the mines at which they are placed to the same extent they would be if they were unassigned cars. Those findings destroyed the principal motive for the use of private coal cars. The use of such cars is decreasing although, no doubt, private cars are displacing railroad-owned cars in some instances, for the testimony shows that the Pennsylvania Railroad at the time of hearing had 35,000 coal cars that were idle while about 10,000 private cars were in use on its rails. The Chesapeake & Ohio, on the other hand, stated that it could not furnish sufficient cars to transport the coal offered it without the use of private cars. Most of the railroads apparently do not consider that the use of private coal cars presents any serious difficulty on their lines.

A presentation was made on behalf of the Aluminum Company of America and the Alcoa Ore

Company, which use especially designed aluminum cars and hopper cars remodeled by sealing the hoppers and affixing spouts with tight valves and putting tops on the cars for the transportation of bauxite ore and concentrates. Their object was to retain the present allowance of 1.5 cents per mile and to have us make that allowance a permanent minimum. We are authorized by section 15 (13) to prescribe only a reasonable maximum allowance. It is optional with the carrier whether it pays any allowance.

Summary and Conclusions.

It is well-settled law that it is the duty of common carriers by railroad to furnish such cars as may be reasonably necessary for the transportation of all the commodities they hold themselves out to carry. That duty, imposed by statute, necessarily implies that the carriers have the exclusive right to furnish such equipment. It is optional with them, whether they exercise that right by furnishing cars owned by them, cars owned by other carriers, or cars leased from independent contractors. Under modern conditions, refrigerator cars have become regular equipment.

A private-car owner, whether he be a shipper or not, has no right to have his cars used as a vehicle for the transportation of freight over the rails of any carrier without its consent. If the carriers have suitable cars and will furnish them on demand they may refuse to transport shipments in private cars. They are privileged to do so at any time they have, or will secure and furnish,

suitable equipment to carry the commodities they hold themselves out to transport. *Armour & Co. v. El Paso & S. W. Co.*, 52 I.C.C. 240, 246.

In *Atchison, T. & S. F. Ry. Co. v. United States*, 232 U. S. 199, 214, 215, the court said:

Whatever transportation service or facility the law requires the carrier to supply, they have the right to furnish. They can therefore use their own cars and cannot be compelled to accept those tendered by the shipper on condition that a lower freight rate be charged.

The carriers, by the rule here under consideration, reserve the right to furnish exclusively all refrigerator cars ordered by shippers other than meat packers. One of the grounds on which we are asked to find the rule not justified is that the use of private cars helps to hold traffic to the rails. We have no authority to require carriers to accept cars furnished by shippers for that or any other purpose. Therefore, unless the proposed rule will result in violation of the act, it is our duty to find it justified.

The purpose and meaning of the rule is clear and, when considered in its entirety, should not lead to any serious misinterpretation or misunderstanding. In the interest of certainty, however, the second sentence of paragraph (b) should be changed to show clearly what is meant by the phrase "special types of refrigerator cars." It is also suggested that the words "car owner" be changed to "such private car lines", in the first sentence of paragraph (d), and that there be added there-

after the words, "except when such private car line is also the consignor or consignee." Likewise the words "car owners" in the second sentence should be changed to "such private car lines."

Protestants object to the rule on the ground that the exception under paragraph (c), which permits meat-packing companies to continue the use of private cars for the transportation of commodities named in item 1130, is unduly prejudicial and unjustly discriminatory. The record shows that dealers in dairy products are in direct competition with packers in the buying and selling of such products. The elimination of the exception in favor of meat-packing companies would remove any alleged undue preference in favor of such companies. The duty would then be upon respondents to furnish suitable cars to transport the products of such meat-packing companies. Since respondents do not have cars suitable to transport fresh meats and packing-house products, it will behoove them to make suitable arrangements to secure cars which will serve that purpose.

The circumstances and conditions surrounding and attending the use of private cars by the protesting shippers and packers differ in several particulars. The railroads hold themselves out to furnish suitable refrigerator cars to all shippers except meat packers. The protestant shippers do not undertake to furnish sufficient cars to take care of their entire traffic but lease, rent, or have on assignment, only such cars as they can keep moving regularly. These cars are used for ship-

ments which will produce the highest possible mileage, and the railroads must keep available and supply cars for the less profitable movements and to take care of the rest of the traffic. Floor racks are removed from private cars by shippers of canned goods and candy, thereby rendering them unfit for other perishable traffic. The cars are moved loaded, in some instances, in the direction of the heavy movement of empty refrigerator cars, for example, from Chicago to the Pacific coast, and must be returned empty because of the absence of the floor racks. None of the shipper protestants who presented testimony own their private cars or have any capital investment in them. Most of those who lease or rent cars derive monetary profits from the mileage earnings and, thereby, obtain transportation at less than the published rates.

If the exception to the rule under consideration was limited to packers cars used in the transportation of fresh meats we might well find that it would not create undue prejudice or unjust discrimination. However, the exception in the rule applies to meat packers generally, and to all commodities handled by them, irrespective of the facts and circumstances surrounding and attending the use by them of private cars. The testimony, in justification of the exception to the rule, is confined to packers who have relieved the carriers from their obligation to furnish cars or, in other words, so far as can be ascertained from the record, to the six packers in whose behalf the joint presentation was made. Hormel & Company, the only other packer

presenting evidence, used railroad cars until about 12 years ago and still continues the use of some of them for commodities other than fresh meats. Most of its private cars are equipped with beef rails. There are a number of meat packers relative to whose business, and the facts attending their use of private cars, we have no information. Copies of contracts furnished by the Merchants' Despatch indicate that some of them lease cars from the same source and on the same terms and conditions as the dairy shippers. Whether they ship dairy products in competition with the latter is not shown, although it was stated on argument that most of the small packers do not ship eggs. Examples of such leases are those of Hormel & Company, for brine-tank cars at \$50 per month from the North American Car Corporation; and those made by the Merchants' Despatch to Jacob Dold Packing Company of New York for 50 brine-tank cars at \$40 per month with the privilege of increasing the number to 100 or reducing it to 25; to Jacob Baum Packing Company for 5 brine-tank cars, with the privilege of increasing the number to 20 at \$42 per month; to Columbus Packing Company of Ohio for 90 brine-tank cars with the privilege of increasing the number to 100, at \$48, per month; and to Western Packing Company for 6 brine-tank cars with the privilege of increasing the number to 15 at \$40 per month. The conclusion indicated is that condemnatory conditions such as we have described herein probably exist in connection with the use of private cars by some packers, as well

The testimony shows that under present conditions the carriers are not equipped to meet their legal obligation to furnish the packers with suitable cars, but this does not mean that they cannot make suitable arrangements for the use of cars to take care of the packers' needs.

Considering these premises we believe the application of an exception to the prohibition against the use of refrigerator cars should be conditioned on requirements that will remedy the present uneconomical, discriminatory, and unlawful practices herein elsewhere described.

That there have been grounds for complaint in the past as to the condition of refrigerator cars furnished by the railroads and because of their failure or inability promptly to supply refrigerator cars in sufficient numbers to take care of perishable traffic offered is not convincingly denied and is admitted by some of the respondents. The statements of protestants as to the present condition and suitability of refrigerator cars now furnished by the railroads and those as to their ability to meet all present demands were made without any real knowledge of the facts. The overwhelming preponderance of the evidence shows that the contrary is true, except as to the needs of certain packers. Cars furnished by the railroads are now being used satisfactorily for the transportation of all commodities shipped by protesting shippers. In some instances the private cars used by the shippers are identical with some of the cars owned by or contracted for by the railroads which would other-

wise furnish the cars. With a few minor exceptions, the private cars, the use of which the railroads seek to prohibit, are obtained from private and railroad-controlled car lines and, in many instances, from the car lines supplying the railroads on which the industries are located. Were such private cars withdrawn from the exclusive service of the shippers it is reasonable to believe that they would be placed in the service of the railroads if and as the demand warranted, either under present or additional contracts. There would be no decrease in the available supply of refrigerator cars.

It is conceded that if the railroads make the necessary effort when cars are ordered from them they can place cars promptly for loading, can see that they are clean, free from objectionable odors, and in good condition and otherwise render as efficient service as the shippers are now receiving by the use of private cars. That they will do so may confidently be expected, for, as the evidence shows, they will go to any legitimate extent to secure traffic. Competition is now too keen for them to treat reasonable demands of shippers with indifference.

We are not greatly impressed by the alleged advantages to the dairy-products, candy, and canned-goods industries in having cars of uniform size. It is doubtful, in view of the variation in the sizes of the packages loaded by each industry, and the heavy movement in mixed carloads, whether the savings in costs of loading and blocking or bracing is such

a material factor as the stress laid thereon by the protestants would indicate. Some of those who stress that factor most are using private cars, that are not uniform in size. The contention that the dimensions of refrigerator cars should be adjusted to meet the size of every commercial shipping package used for the numerous commodities transported is unsound and unreasonable. To hold that each and every industry and different parties in the same business, such as the dairy shippers, who insist on having cars that are 32 feet 8 or 10 inches long, and those who say that they require cars 33 feet 4 inches long, are entitled to demand that the cars be designed to permit the loading of their particular shipping packages without any unoccupied space, or in a personally preferred manner, would place an undue burden on the carriers.

An amended rule that will accomplish the purpose sought without undue prejudice or unjust discrimination is not only justified because of the exclusive right of the carriers to furnish cars, but also is advisable in the interest of economical operation and as a means of preventing unlawful rebates.

The use of private cars does not relieve the carriers of their obligation to furnish cars. They must be prepared at all times to accept any and all traffic offered to them by those now using private cars as well as by other shippers. The private cars supplant the railroad cars on regular lucrative hauls. Railroad cars are forced to stand idle while the carriers

are paying 2 cents a mile for the use of private refrigerator cars. The Chicago & North Western, one of the protestants, pays 2 cents per mile to users of private cars identical with displaced railroad cars leased by it for 1.5 cents per mile. Private cars, when held for loading, are stored on the tracks of the carriers and, when ordered placed, must usually be cut out from among other cars with resultant additional switching. Expedited return-empty movement is frequently insisted upon and, to a minor extent, the tracing of and passing reports on empties are requested and given. Private cars are moved empty from home plants to loading points even though railroad cars may be available at the loading points. As has already been noted, shipments of candy and canned goods move to the Pacific coast in private refrigerator cars when there is a large number of cars at all times at the points of origin moving empty to the coast. Shippers leasing or renting private refrigerator cars frequently insist that such cars be used for the transportation of commodities that do not require protection and, in some instances, that the cars be moved empty long distances for return with such lading.

The evidence is convincing that the general use of private refrigerator cars entails unnecessary expense to the carriers.

Section 15 (13) of the act provides:

If the owner of property transported under this Act, directly or indirectly, renders any

service connected with such transportation, or furnishes any instrumentality used therein, the charge or allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as a maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentalities so furnished, and fix the same by appropriate order, * * *

The paragraph as quoted contemplates that, if a carrier uses instrumentalities furnished by an owner of property transported, it may pay therefor. The only restriction on the payment to the shipper is that it shall be no more than is just and reasonable.

A car line, whether it be shipper or not, cannot be expected to build, maintain, and supply cars to the railroads unless it may reasonably expect to obtain a fair return on its investment. In fact, they could not obtain the necessary capital under any other conditions.

A shipper, on the other hand, who owns no cars, but leases or otherwise obtains cars through a car line, whether privately owned or railroad controlled, under terms which place him in a more favorable position respecting the question of transportation than that prescribed by the published tariffs and occupied by shippers generally, is receiving an unlawful concession in violation of the Elkins Act. *Interstate Commerce Commission v. Reichman*, 145

Fed. 235, the controversy involved our power to require a witness to answer a question relative to the payment of part of the car company's mileage earnings to shippers. The court said:

The purpose of the enactment of the statutes relating to interstate commerce was to give to all shippers of property uniform treatment in the matter of transportation and the Interstate Commerce Commission was created to secure the enforcement of those statutes. In the discharge of this duty, the Commission was authorized to procure information from any person whatsoever tending to show whether those laws are being obeyed. The question then presented is, would the payment, by the private car company, of a sum of money to a shipper who had previously paid the railway company the regular rate, place such shipper in a more favorable position respecting the question of transportation than that prescribed by the published tariff and occupied by shippers generally, and if so, has Congress prohibited those private car companies from making such payment, and, was the prohibition authorized by the Federal Constitution. Whether the person to whom the payment is made has, thereby, been removed from the level of equality to establish which the laws were passed, is too plain to justify extended consideration. With respect to the transportation of his property he is just as much better

off than the general run of shippers as the payment amounts to. The net cost of the transportation to him—for freight expenses—has been reduced just that much. It, therefore, being apparent that in such a case the purpose of the legislation has been defeated, the inquiry is, “Has this defeat resulted from a violation of a valid statute of the United States?”

The court then proceeded to a discussion as to whether the Act to Regulate Commerce was sufficiently broad to cover some of the abuses which it was enacted to cure. It said:

That law sought to establish a condition of absolute uniformity throughout the domain of interstate transportation to the end that no man having freight to ship would be charged more than anybody else would have to pay. That this law failed to accomplish the object of its enactment was due, primarily, to the fact that its prohibitions were aimed at and operated only on carriers. Its provisions did not extend to and embrace persons and corporations interested in, or concerned with the transportation business other than carriers, and their agents and shippers remained at full liberty to exact from railway companies transportation service at lower rates than were accorded patrons generally. If lower rates were given, the carrier only was guilty of an offense. The principal effect of the law seems to have been to require the resort to

round-about methods for the purpose of evading uniformity. The records of the proceedings of the courts and of the Interstate Commerce Commission during the years succeeding 1887 disclosed the employment of a large variety of means to evade the law. One of these was the use of the so-called private car; that is, a car which did not belong to the railway company, but did belong either to the shipper himself or to a corporation which was neither carrier nor shipper, it being generally understood that in the case of the shipper whose traffic went forward in his own car excessive payments were made to him on the alleged score of mileage, which, in effect, brought his transportation cost below the regular rates, and in the case of the shipper whose goods were vehicles in cars belonging to a car company payments of money, as commissions or otherwise, were made to him by or through the medium of such private car companies; the effect of which was to give him the service at a cost below the regular tariff.

The court then proceeded to show that additional prohibitory legislation was regarded by the Congress as necessary which would extend to shippers and to persons and corporations beyond, or behind, the railway company, and this resulted in the enactment of the Elkins Act. The court concluded that that act prohibits the car company from giving to any shipper of property a favor or advantage not

publicly offered to all shippers by the published tariffs issued by the carrier.

In *Spencer Kellog & Sons v. United States*, 20 Fed. (2d) 459, the question was whether an elevator company was guilty of rebating that received from a carrier a published allowance of 1 cent a bushel for the service of elevation and paid half of it through grain brokers to a shipper when the freight rate included elevation. The Circuit Court of Appeals of the Second Circuit affirmed the conviction and said in part:

Congress did not intend to limit the offense described in it to cases of collusion between the carrier and the shipper. What was done by the plaintiff in error is not in dispute; therefore, the question is whether what was done constitutes an offense by this plaintiff in error, even though it were not established to have been done in collusion with a carrier or with its knowledge or consent. The law was intended to reach either individuals or corporate entities who contribute knowingly and understandingly to a rebate or concession by any manner or device and the relation which the culprit bore to the carrier is not necessary as a foundation upon which to rest responsibility.

The majority of the shipper protestants who rent or lease cars and of the private-car lines heard herein refused to divulge the amounts paid to or retained by said car lines. The shippers refused on

the ground that they did not feel warranted in doing so without the consent of the car lines. The car lines refused on the ground that they could not afford to do so because of the keen competition between them. Consequently the extent to which the money paid to protestant shippers by the railroads or refunded to them by the car lines exceeded the cost of such cars to the shippers cannot be determined from the evidence. One shipper stated that he paid \$45 and \$50 per month per car for the cars leased by him and that the profits derived therefrom were approximately \$32.50 per car per month on about 200 cars, or approximately \$78,000 per year. Another originally used assigned cars but upon learning that others were making money by the use of private cars, entered into a contract under which it pays nothing to the lessor, but receives mileage earnings about a specified amount which averaged about \$18.75 per car per month in 1931 and \$21.27 per car month in 1932 on 150 cars.

While considerable stress was laid by shippers renting and leasing cars on the several factors hereinbefore set forth as reasons why they desire to continue the use of private cars, and while they refuse to admit that monetary profits were the principal reason, several stated that if they were deprived of such profits they would give their traffic to the trucks even though the railroads furnish cars identical with the private cars they are now using and the service was otherwise as good in

every particular. One witness, representing the associations heretofore named, objected to the establishment of reduced rates on dairy products to meet truck competition because of the effect such rates would have on prices at production points. He preferred that transportation costs be reduced by profits derived from the use of private cars. Presumably because the producers have no means of determining the amount of such reductions.

The leases usually call for the payment of stated amounts per month and the mileage earnings are either paid directly to the shippers or to the lessors. In the latter cases the lessors deduct the amounts due the car companies under the contracts and remit the remainders to the shippers. The contract price is usually fixed sufficiently low so that the mileage earnings will exceed the cost to shippers. It is true that, when the cars are leased, the lessees and car companies do not know definitely what the future mileage earnings of the lessees will be, but the evidence is convincing that the inducement actuating the shippers and held out by the car companies is that, if only sufficient cars to take care of assured needs are leased, profits may confidently be expected. While the amounts of the profits are indefinite it is a practical certainty that there will be some. Were this not true there would be no advantage in leasing cars over obtaining them on assignment.

The rental contracts differ from the leases in that the shipper is not obligated to pay anything

for the use of the cars. He obtains the cars without cost to him. They are agreements between the shipper and the car company that the car company will pay over to the shipper part of the mileage earnings received from the railroad provided only that the mileage earnings exceed a stated amount. The amount invariably is fixed sufficiently low to assure the shipper of some monies from the car company.

It cannot be denied that the net cost of the transportation to users of leased and rented cars is reduced by the amounts received in excess of the costs to them and that they are thereby removed from that absolute level of equality with other shippers which the statute was enacted to establish and that the purpose of the legislation is defeated.

The car companies collect and retain all of the mileage earned by assigned cars, but a rebate may be effected by what is equivalent to cash just as successfully as when cash is paid. As we have seen, the painting of advertising matter on assigned cars is a thing of value. In fact one witness considered it such an important item in his company's nationwide scheme of advertising that he declared it would give its traffic to trucks if it were deprived of such advertising. Several others laid considerable stress on the value of the advertising. There can be no doubt that the beneficiaries thereof are receiving something of value that is not and cannot be given to all shippers.

The conclusion is inescapable that the demand for the use of private cars by shippers is because of the profit flowing to them by the use of such cars. If such profits were denied to them, as we think they must be, it is inconceivable to believe that shippers would continue to pay amounts ranging from \$30 to \$50 per car per month when they could demand that the carrier supply suitable cars without cost over and above the freight charges properly applicable to the shipments transported.

The carriers should give careful consideration to complying with their legal obligations to furnish suitable refrigerator cars of their own ownership or those with whom they have contractual relations for the transportation of perishable commodities which they hold themselves out to transport. This applies equally to the cars for the transportation of products of the meat packers. In the interest of efficiency and economy of operation and considering the seasonal needs of refrigerator cars a pooling of such cars under unified operation might well be considered.

The discussion herein has been confined almost entirely to refrigerator cars and the findings will be so restricted, but the general principles enunciated apply equally to all other types of private cars.

We find that the proposed amendment of rule 35 is justified but that the proposed section 1 of rule 36 is not justified, without prejudice to the filing of an amended rule conforming to the suggestions

herein. Such amended rule should not contain an exception in favor of meat-packing companies as now proposed. We further find that the use of private refrigerator cars by shippers results in uneconomical operation and unnecessary expense to the carrier; that a shipper who pays only the published rates and uses private cars displaying advertising matter receives something of value in addition to the transportation of his traffic not available to those using cars furnished by the railroads and that the practice should be prohibited; that the payment in whole or in part to shippers, including meat packers, of mileage earnings by railroads either direct or through car owners in excess of the amount of rental said shippers pay for the use of the cars and other actual expenses in connection therewith results in such shippers receiving transportation of their products at lower rates than those paid by shippers generally who use cars furnished by the carriers and at less than the published rates; and that any allowance paid to the shipper-owner of private cars, including meat packers and their operating subsidiaries or agents, by the railroads as mileage earnings in excess of the ownership cost, including a fair return on the investment, are unreasonable, unjustly discriminatory, and unlawful rebates and concessions.

We do not undertake to say that a carrier may not accept private cars if it so desires, but if such cars are accepted the carriers may not acquiesce in

arrangements under which mileage earnings accruing to the car owner are paid in whole or in part by such car owner to the shipper lessee which results in the payment by such shipper of charges less than the published tariff rate.

Respondents will be expected to take the necessary action to remedy the conditions found uneconomical and unlawful herein.

An order will be entered requiring the cancellation of section 1 of rule 36 and discontinuing the investigation and suspension proceeding. No order will be entered in Ex parte no. 104, part V.

Commissioner Splawn did not participate in the consideration and disposition of this case.

.ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 2d day of July, A. D. 1934.

Investigation and Suspension Docket No. 3887

Use of Privately Owned Refrigerator Cars

It appearing, That by order dated May 23, 1933, the Commission entered upon a hearing concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules enumerated and described in said order, and suspended the operation of said schedules until January 1, 1934;

It further appearing: That the operation of said schedules has been voluntarily deferred by respondents until October 31, 1934;

And it further appearing, That a full investigation of the matters and things involved has been had, and that the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel those schedules under suspension which are contained in section 1 of rule 36, as described in said report, on or before October 30, 1934, upon notice to this Commission and to the general public by not less than one day's filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act;

It is further ordered, That the order heretofore entered in this proceeding, suspending the operation of said schedules, except as to the schedules mentioned in the next preceding paragraph hereof, be, and it is hereby, vacated and set aside as of July 25, 1934;

And it is further ordered, That this proceeding be discontinued.

By the Commission,

[Seal]

GEORGE B. McGINTY,

Secretary.

Thereupon

DAVID T. AYRES,

called as a witness on behalf of the plaintiff being first duly sworn testified as follows:

Direct Examination.

By Mr. Williamson:

I am the freight car service agent for the Southern Pacific Company. In that capacity I am familiar with the tariffs and the use and operations of tank cars, and with the position of the Southern Pacific Railroad Company in regard to supplying tank cars. Referring particularly to the period from September, 1933 to and including August, 1935 the Southern Pacific Company did not own sufficient tank cars for general use or service suitable for use in the transportation of cocoanut oil from the San Francisco bay area to eastern points, nor was the Railroad obligated under the Consolidated Freight Classification Tariff No. 10 effective December 7th, 1935 and the tariff regulations which were practically the same and were in effect prior to that time. During that period we did not generally furnish tank cars for the use of edible oils. We but rarely allow our tank cars to go east of a certain point. I am familiar with the nature of the service of the El Dorado Oil Works. We do not hold ourselves out to supply cars for transportation of the type mentioned here.

(Testimony of David T. Ayres.)

Cross-Examination.

By Mr. Matthew:

The Southern Pacific Company owns some tank cars and has owned tank cars for a great many years past. Those tank cars are sometimes supplied to shippers for the loading of such liquid commodities as oil. They are sometimes furnished to shippers for the loading of cocoanut oil. We have very few facilities of that kind and to meet the requirements of the trade we have to call upon shippers to furnish their own cars. If they are small shipments we might handle them. We do not [46] attempt to meet the requirements of that particular trade. It would be an isolated case where we supply the cars. The company owns only approximately 50 tank cars of the kind used in the transportation of cocoanut oil. It is a matter of hundreds of tank cars, over and above those 50 cars, that are traveling over our lines during the season for the movement of the oil.

Redirect Examination.

By Mr. Williamson:

Roughly, the Southern Pacific Company owns 40 tank cars of 6,000 gallons' capacity; about 50 of 8,000 gallons' capacity; 73 of 10,000 gallons' capacity; and about 2,100 of 12,500 gallons' capacity. The tank cars which were used by the El Dorado Oil Works in the transportation of cocoanut oil were those having a capacity of 8,000 gallons. If we fur-

(Testimony of David T. Ayres.)

nish them they would have to move to eastern points and come back in a more or less continuous operation. Of course, being our cars, they would have to come back to our railroad.

Thereupon

PERCY H. EMERSON,

called as a witness on behalf of the plaintiff, being first duly sworn testified as follows:

Direct Examination.

By Mr. Williamson:

"I am transportation inspector of the Western Pacific Railroad Company, in charge of the movement of tank cars. I know the tank car situation of that company, what tank cars they have, and for what purposes they offer them to the public. The Western Pacific Railroad Company during the period September, 1933, through and including August, 1935 did not have tank cars for rental or for use by the public in the transportation of vegetable oils from Bay points to eastern points. We would look to the tariffs to which Mr. Ayers referred to find the freight rate to be paid on the movement of the commodities from the San Francisco Bay area to eastern points, and to determine the [47] amount that the railroad companies under which the haul was made, would pay to the supplier of the tank cars on each of such hauls, and there

(Testimony of Percy H. Emerson.)

were no other tariffs or rules or regulations applicable to those subjects.

Cross Examination.

By Mr. Matthew:

All I meant by my answer was that certain freight tariffs are published by the carriers and are filed with the Interstate Commerce Commission, which includes certain freight rates and include among others rates governing the movements of cocoanut oil in tank cars from points in California to points in the Middle West and the East.

Thereupon

JOHN A. CHRISTIE

called as a witness on behalf of the plaintiff being first duly sworn testified as follows:

Direct Examination.

By Mr. Williamson:

I am Division Superintendent of the Atchison-Topeka and Santa Fe Railway Company. I have in charge the matter of transportation of tank cars and freight cars. I don't know whether the Santa Fe has ever furnished any tank cars during the period between September, 1923, and August, 1935, to the El Dorado Oil Works for the movement of cocoanut oil from the San Francisco Bay Area to eastern points. We have no tank cars assigned to

(Testimony of John A. Christie.)

the service of the El Dorado Oil Works or to the movement of cocoanut oil. I have no knowledge that any were ever so assigned. I do not recall that any were ever assigned to the Durkee Famous Foods Company, or the Best Foods Company, or the Philippine Refining Company. The Santa Fe has tank cars of that type available. We have all classes of tank cars. We do not have enough cars to handle the public demand.

Cross Examination.

By Mr. Matthew:

By assigned cars I meant that they were exclusively [48] set aside for the service of the shipper. The company owns a great many tank cars, I think 3400, that are used throughout the Santa Fe system, and from time to time are furnished to shippers for the transportation of liquid commodities when available.

Redirect Examination.

By Mr. Williamson:

These tank cars are used in the transportation of fuel oil. El Dorado Oil Works might have ordered a car at some time for the transportation of its cocoanut oil and we might have furnished the car. We don't furnish a car to the El Dorado Oil Works for the transportation of its cocoanut oil unless they order it, and I don't recall ever furnishing one. It is my understanding that the railroad companies do not hold themselves out as fur-

(Testimony of John A. Christie.)

nishing tank cars for the movement of vegetable oils.

Recross Examination.

By Mr. Matthew:

I mean that the tank cars of the Santa Fe were built for their own use exclusively for the transportation of fuel oil, but are sometimes switched into other service like gasoline and distillate. I don't recall using an oil car for the transportation of wine but it is possible. I think the tank cars of the Santa Fe are sometimes furnished to shippers and used for the transportation of vegetable oil. If we got an order for a load of cottonseed oil and had a car, we would place it for loading. This would be in the same way that we would furnish a car if we had it available for the transportation of cocoanut oil. If a shipper such as El Dorado Oil Works should ask us to supply a car for the transportation of cocoanut oil from Oakland or Berkeley to a point in the middle west or east reached by or through our road, and we had such car available, the El Dorado Oil Works would be regarded the same as any other company that had certain commodities to move from one point to another, and if we had the car [49] available we would furnish it. Not many of these tank cars of which I speak are equipped with coils. In the movement of cocoanut oil, the coil part is necessary.

Thereupon

DOUGLASS M. BARROWS

was called as a witness on behalf of the plaintiff and being first duly sworn testified as follows:

*** Direct Examination.**

By Mr. Williamson:

I am the Assistant Secretary of the El Dorado Oil Works and the El Dorado Terminal Company and am in charge of their books, accounts and records. I am familiar with relations between these companies and the General American Tank Car Corporation and with the contract entered into between El Dorado Oil Works and the General American Tank Car Corporation of September 28th, 1933. I am familiar with the movement of all of the cars leased under that contract from the period from December 1st, 1934 to August, 1935. They were loaded with cocoanut oil, and most of them moved from the Berkeley plant of the El Dorado Oil Works or from the Terminal to Eastern points generally. I know that the El Dorado Oil Works did not pay the freight on these movements. In every case the consignee did. These cars leased by my Company from the General American Tank Car Corporation under this particular agreement are not the ordinary tank cars as generally understood. The main difference is in the fact that they have steam coils. Cocoanut oil is a solid at particular temperatures. It melts at 85 to 90 degrees and below that it is a white, solid substance. Consequently the

(Testimony of Douglass M. Barrows.)

cars in which it is carried must be equipped with steam coils, which lie horizontally in the bottom of the tank. The coils must be extremely clean. A little rust, discoloration or anything like that is apt to completely ruin or at least reduce the value of the oil in it because the oil is very [50] delicate. A very small amount of rust or discoloration will hurt it immensely. I don't recall ever making any effort to get tank cars for the purpose of moving our oil. We never had any dealings with any of the railroads moving this commodity with reference to the amount of freight bills that were paid.

“Mr. Williamson: Q. Has your company ever had any understanding or agreement with any railroad company with regard to its receiving directly or indirectly any refund or preference or discriminatory rates on commodities shipped?”

Mr. Matthew: That is objected to as incompetent, irrelevant and immaterial, and the proper foundation not laid for it. I think it is entirely outside the issues in the case.

The Court: How do you believe that is within the scope of this case?

Mr. Williamson: I should perhaps limit it to the particular period here, September, 1933, to August, 1935. My purpose of the question is to divorce us entirely from any dealings with the railroads, whatever, in this matter.

Mr. Matthew: That is entirely immaterial, under decisions which I can cite to your Honor. Under

(Testimony of Douglass M. Barrows.)

the Elkins Act provisions against indirect concessions, rebates, and unfair advantages to the shipper do not only run against the carrier. They should not be a party to any plan whereby a shipper or consignee obtains an indirect rebate. It is not necessary the carrier itself shall in any respect concur in the arrangements whereby the concession may be obtained. I can cite your Honor cases to that effect.

Mr. Williamson: You do not contend that the El Dorado Oil Works has any agreement with any railroad carrier with reference to these so-called rebates, do you, Mr. Matthew? [51]

Mr. Matthew: Well, I make no such contention because it is not within the issues of the case. There is nothing in the complaint or answer that says anything about any understanding or arrangement between the El Dorado Oil Works and—

Mr. Williamson: It would be probably more in order for rebuttal, but in view of the fact you do not contend we have, as I understand your position and your pleadings,—then I won't insist upon this question.

Mr. Matthew: I am talking about the pleadings."

Then Mr. Barrows continued with his testimony as follows:

Payments were made by General American Tank Car Corporation to El Dorado Oil Works between September, 1933 and August, 1935 on vouchers purporting to cover mileage earnings in excess of rental, with the accompanying statements showing

(Testimony of Douglass M. Barrows.)

what the payments covered. After some time in the middle of the year 1934, no payments were made to El Dorado Terminal Company or Oil Works.

*A*Cross Examination.

By Mr. Matthews:

My company was credited thereafter with such proceeds of the mileage earnings as were equal to the rental or car hire reserved in the contract of September, 1933. We have actually paid nothing more by way of rental for car hire to the defendant since the summer of 1934. No money passed either way. Our shipments of cocoanut oil are made customarily pursuant to contracts which we have with Eastern purchasers. We make our contract for forward sales over a period of several months at definite prices in tank cars containing 60,000 pounds of cocoanut oil, price f. o. b. Berkeley, and they are shipped to order from there on. There is always a written contract covering each order that is taken. It has been our practice throughout the entire period to make quotations on [52] prices uniform f. o. b. Berkeley.

Thereupon the following portions of the deposition of

MR. DONALD H. SMITH,

a witness having been first duly sworn, who was called on behalf of the plaintiff, were offered and read by plaintiff:.

Direct Examination.

By Mr. Williamson:

I am Traffic Manager of the General American Tank Car Corporation, and as such I handle the tank cars of that corporation including tank cars that are under lease. My handling consists of the distribution and movement of the cars, keeping the records and computing the mileage, and primarily the functions of the Traffic Department. I recall having dealings with El Dorado Oil Works with respect to the use of tank cars as long as I can remember. The handling of tank cars referred to in the agreement of September 28, 1933 which has been handed me came within my function as traffic manager. Outside of the cars specifically provided for as under constant use under the terms of the lease any cars that were desired would ordinarily be ordered through Mr. Musser, Head of our Los Angeles office. He had certain cars on the Pacific Coast available for filling orders, but if he did not have sufficient cars he would call on us. I do not recall any instance of Mr. Musser asking us for other cars. I would say that we had probably 400 tank cars operating in California. These cars have

(Deposition of Mr. Donald H. Smith.)

operated over practically all of the lines from Chicago westward to the Coast. I am familiar with the rate set-ups of the various lines and with their rules and regulations with respect to the movement of cars. The tank cars are all handled under rules or regulations with respect to the handling or movement of tank cars such as those covered by this contract for use in the transportation of vegetable oils, which are contained in published tariffs approved by the Interstate Commerce [53] Commission. As far as I know, there are no rules or regulations governing the handling or movement of tank cars for the transportation of vegetable oils except those that are contained in the published tariffs approved by the Interstate Commerce Commission or the Railroad Commission. I do not know of any change in those tariffs limited to tank cars used in the transportation of vegetable oil since September 28th, 1933. I know of no contract between my company and the Western Pacific Railroad, Atchison-Topeka and Santa Fe, or the Southern Pacific Railroad for the movement of our tank cars in their several areas. We have no contracts with railroads with respect to the payment of mileage earned on cars, nor have we ever had during my time. The payment of mileage on the movement of tank cars is based on the published tariff approved by Interstate Commerce Commission, and all sums derived by my company as mileage earned on the movement of tank cars owned or operated by it are based on

(Deposition of Mr. Donald H. Smith.)

those tariffs. That matter is clearly within my personal knowledge, and is applicable to all of our relations with the Western Pacific, Southern Pacific and Atchison-Topeka and Santa Fe. All of the tank cars leased to the El Dorado Oil Works under the contract in question and all of the tank cars which we have from time to time rented to El Dorado are all owned by my company and are not owned by any railroad. No payments have ever been made by any railroad with respect to the use of these tank cars covered by our contract other than as provided or permitted by the published tariffs. The only considerations are those which have been paid to us. We have other contracts governing the movement or leasing of cars in the California area in addition to contracts with El Dorado Oil Works. We have probably 400 tank cars in general service in the California area. We have a yard in California, where repairs are made by us. We have tank cars on San Francisco [54] Bay to take care of shipments called for by El Dorado Oil Works or other people the Southern of the railroads in California furnish to shippers tank cars suitable to transportation of commodities similar to the commodities shipped by the El Dorado Oil Works. It is my understanding that Southern Pacific Company furnishes tank cars for transportation of coconut oil, although this is hearsay and I have had no actual experience in connection with it. I have made the settlements from time to time with the railroads with regard to payment of mileage paid to my com-

(Deposition of Mr. Donald H. Smith.)

pany for the account of cars referred to in the agreement with El Dorado Oil Works, dated September 28th, 1933.

The following additional portions of the testimony of Mr. Donald H. Smith were offered and read by defendant:

Dorwood & Sons, operating out of San Francisco, lease cars from us at the present time for the movement of cocoanut oil products. Durkee Famous Foods, operating in Berkeley, lease cars from us, and their plant at Portland has also leased cars from us. There are undoubtedly other corporations or concerns about San Francisco Bay to which we have leased tank cars as distinguished from refrigerator cars, although I cannot recall them.

Thereupon the following portions of the deposition of

THOMAS B. KIAS,

a witness called on behalf of the plaintiff, having been first duly sworn, were offered and read by plaintiff:

Direct Examination.

By Mr. Williamson:

I am in charge of the billing department of the General American Tank Car Corporation. My employment covers the billing of tank car rentals and mileage and the billing for cars furnished under the

(Deposition of Thomas B. Kias.)

contract of September 28th, 1933. We bill the El Dorado Oil Works or Terminal Company for the monthly rental agreed upon on the number of cars covered by the contract and also for the number of cars temporarily [55] rented. Car service and car rental is the same thing. Under the contract, El Dorado is not responsible for repairs, and unless there is something unusual they are not billed for repairs. I prepared or there was prepared under my direction monthly statements and invoices similar to the carbon copies of some of which have been shown to me and previously mailed to the El Dorado Oil Works or Terminal Company during the period covered by the contract of September 28th, 1933. The statements were correct to my best knowledge.

Thereupon Mr. Matthew offered and read the following portions of the deposition of Mr. Kias, being his testimony on

Cross Examination.

By Mr. Smith, counsel for defendant:

During the effective period of the contract in question, that is to say from September, 1933, to the present time, we have given the plaintiff credit for mileage to the extent of rental charges which have accrued on the cars during such period. We have made no collections from the plaintiff and we claim no sums due from the plaintiff on account of the rental which has accrued on these cars during that

(Deposition of Thomas B. Kias.)

period. The statements that have been furnished by the defendant to the plaintiff and about which I was interrogated simply show the amount of rental that accrued on certain indicated cars for certain periods of time. None of the statements shows any allowance of mileage or any data as to mileage.

Thereupon Mr. Williamson offered and read the following portions of the deposition of Mr. Kias:

Redirect Examination.

By Mr. Williamson:

When I stated on cross-examination that in our adjustments or invoices of account with plaintiff or El Dorado Oil Works, we made no claim for agreed rentals, I meant that we made no claim for rental for any balance due from the El Dorado Oil Works or [56] the plaintiff; that there was and is no rental overdue; there is nothing due that has not been offset by mileage earnings. Service charges which are for the agreed monthly rental per car would normally be billed for the month in advance, and against that credit would be thereafter given for the amount collected and received by us as mileage. Since July, 1934, we have made a change in our accounting arrangements in so far as the crediting of mileage is concerned. Before that date, we remitted to the El Dorado Oil Works mileage received by us in excess of the contract rental sums but have

The following portions of the deposition of

MR. ARTHUR A. SOLENKE

a witness called on behalf of plaintiff having been first duly sworn, was offered and read by plaintiff:

Direct Examination.

By Mr. Williamson:

I am Assistant Comptroller of the General American Tank Car Corporation. In that capacity I received information of the accounts and transactions between my company and El Dorado Oil Works and El Dorado Terminal Company in connection with the rental of tank cars from other departments of my company and set it on the books. In so doing, I believe the figures to be correct and do not know of any incorrect figures so set up. I know that there have been contracts between the Companies, and to my knowledge the only transactions between the companies have been in respect to renting and leasing tank cars.

The first item on the first page of the ledger sheets, Plaintiff's Exhibit No. 1, is dated December 1, 1933. These ledger sheets are chronologically arranged from that date to the last date, which is December 1, 1935. The pages are divided into two parts with four columns in each part. The columns of the first part are designated as the date, items, folio and debits. The columns of the second part are headed by the date, [57] items, folio and credits. These pages reflect in the first part of the debit

(Deposition of Mr. Arthur A. Solenke.)

umns of the second part represent the credit items of the El Dorado Oil Works. In pencil at the top of the first column of "debits" is the figure of \$12,681.66 and the first figure on the credit side is \$18,954.26. Those figures represent totals transferred from previous pages that have been taken out of our current ledger on account of the fact that the items appearing on those ledger sheets have been wholly paid or accounted for, or, in other words, balanced out. There is a red line below and there are debit charges against the El Dorado Oil Works. The item "December car service, folio 11090, \$2,275" represented the car rental charge of my company against the El Dorado Oil Works for the month of December, 1933. The next item is "December 11, Voucher No. 8843" and then there is a debit item "\$3,997.60." The latter item represented the amount due the El Dorado Oil Works on that date which we paid to them by that voucher reference. The items to which you have called my attention above the red line indicate that I, after deducting the rental that accrued for that month, remitted by check \$3,997.60, to balance up the account at that time. There were similar vouchers from time to time. For instance, in the month of January there was another voucher item, \$3,569.96; in February, \$4,650.58; and in March, \$2,295.31. If vouchers are subsequently mentioned upon the ledger sheets they are explained in the same way that I have explained these last items. On June 13, 1934, we checked out the sum of \$1,028.46 to the El Dorado Oil Works.

(Deposition of Mr. Arthur A. Solenke.)

On August 21, 1934, we checked out the sum of \$65.52. There appear to be no other voucher items after that date. We have never paid to El Dorado Oil Works by check any item after that payment. To explain how we arrived at that item of \$65.52 [58] from these records: we issued that voucher in payment of the credit memorandum issued up to and including No. 3245, which totaled \$2,826.52, from which amount we deducted the bill rendered for car service in June, our No. 5785, amounting to \$11.00 and our bill rendered July 1st for July car service, our No. 6096, for \$1375., and our bill of August 1st covering August car service, our No. 7094, for \$1375., a total deduction of \$2,761.00 for car service, and we paid the net difference of \$65.52. The figure that we used, \$2,826.52, which was a credit on our books to El Dorado Oil Works, represents mileage earned and car service adjustments which were merely nominal. That mileage was therefore all earned in the month of June or prior, 1934. During the period covered by the contract it was the practice to send our vouchers to El Dorado Oil Works in settlement of the balances due from time to time. This occurred over a long period of years. The mileage earned on the cars during the period of the contract and out of which remittances were made to El Dorado Oil Works was intended by me to mean the mileage earned under the existing railroad tariffs at all of those times. The account closing on the third page of our ledger sheets shows in

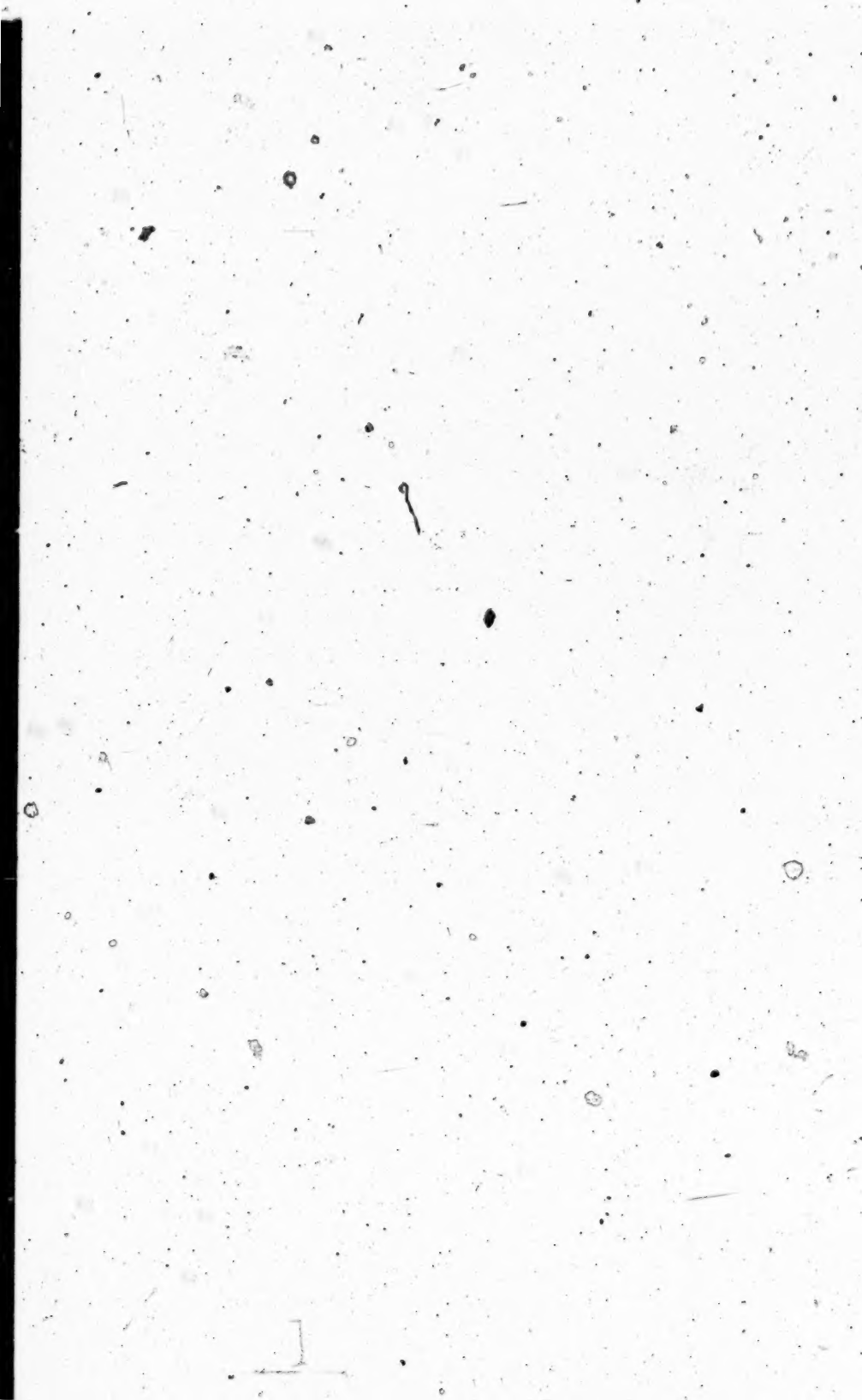
(Deposition of Mr. Arthur A. Solenke.)

pencil on the credit side \$17,759.88. That is not in my handwriting. The item refers to the total of the items appearing on the credit side of that account during the months of November and December, 1934, and January, February, March, April and May, 1935, including the item of \$5,724.53 brought forward from a previous page, and which in turn represented the credit item for the El Dorado Oil Works as of October 31, 1934.

Mr. Williamson thereupon introduced into the evidence photostatic copies of the five ledger sheets detached from the deposition of Mr. Solenke. The photostatic copies were received by the court and marked

PLAINTIFF'S EXHIBIT No. 1.

The photostatic copies of said Exhibit are as follows: [59]



1934	ITEMS	FOLIO	✓	DEBITS	DATE	ITEMS	FOLIO	✓	CREDITS
Nov	Nov Car Service	1088		1375.00	Nov 70	Nov Mileage	1024		1727.53
31		10462		15000	25		10222		2715
					30	Nov Car Service	10273		264598
									621
									841317
Dec	Dec Car Service	11089		1375.00	Dec 25	Dec Mileage	10190		151879
31		10462		15000	31	Dec Car Service	10273		177
									692442
1935									
Jan	Jan Car Service	1100		1375.00	Jan 75	Jan Mileage	228		152323
31		450		12677					1144766
Feb	Feb Car Service	1100		1375.00	Feb 25	Feb Mileage	711		150177
28		1634		14286					1294913
Mar	Mar Car Service	1096		1375.00	Mar 25	Mar Mileage	1010		156786
				1213605	31	Mar Car Service	1302		491
									1531220
Apr	Apr Car Service	1095		1375.00	Apr 25	Apr Mileage	1094		137099
15	Mar	1095		27000	25		1761		27090
30		1095		3000	30		1812		3000
30	Apr	1095		17314					1619229
				1095219					
May	May Car Service	1103		1375.00	May 25	May Mileage	1010		156814
31	Apr-May	1095		29623	31	May Car Service	1094		1965
				1665312					127611

FILE

1991	ITEMS	DEBIT	DATE	ITEMS	CREDIT
May 1	May car service 4125	137500			61480
10	Do 4436	250739			
May 2	Apr May car service 4406	19000	May 16	Apr car service 4059	183
			21	May	11000
			25	Apr Mileage 2282	248163
					259346
				246.76	
June 1	June car service 5108	137500			
13	Do 5264	102846			
June 8	June car service 5165	1100	June 20	Jul Mileage 2540	2929
			25	May	2320
			30	June	253
			30	June car service 2898	2200
				131840	132740
July 1	July car service 4096	137500	July 20	June July Mileage 3042	1471
		13900	30	June car service 3202	275
			25	July Mileage 3245	1474100
			30	June July car service 3447	238
				1445.95	213190
Aug 1	Aug car service 5094	137500	Aug 25	June July Mileage 371	41259
7	Do 8244	6552		41797	31119
		212652			
Aug 1	Apr car service 4196	137500	Sept 1	July car service 4006	2927
		52152	10	June July	1760
			25	Aug Mileage 4215	43780
			30	June July Aug	3248
					31114
Oct 1	Oct car service 4096	137500	Oct 25	Sept Mileage 4807	194177
31		6240	31	Apr car service 4828	82
		563442		75.11	370452

DATE	ITEMS	FILE	DEBITS	DATE	ITEMS	FILE	CREDITS
12/31	Ala. Car Service 1090		27500				10,240
	170 8103		399760				
				Dec 10	Ala. Car Service	5670	7341
				11	Ala. "	5671	5421
				21	Ala. " "	5736	27601
				25	Ala. Mileage	5761	550460
12/31	Jan Car Service 113		17500				
	17 00 845		356946				
				Jan 20	Jan Car Service	5571	22258
				20	Ala. Mileage	731	609049
				20	Ala. Car Service	741	849
					13 17 2		133586
Feb	Feb Car Service 111		14500				
	11 00 845		465156				
	28 Ala. Car Service	16636	34	Feb 16	Ala. Car Service	560	629
				25	Jan. Mileage	743	373473
				21	Feb. Car Service	742	11143
							11-43
Feb	Feb Car Service 210		12500				
	16 00 845		224531				
Feb	Feb Car Service 250		15000	Feb 15	Jan Mileage	1032	2268
				10	Jan. Mileage	1033	12993
				25	Feb. "	782	336353
					33660		33660
Apr	Apr Car Service 319		15000				
	10 00 845		184114				
	20 Apr Car Service 337		13750	Apr 15	Apr Car Service	702	216750
				25	Ala. Mileage	761	493289
					11 00 3		431529

MICRO CARD

TRADE MARK



22

39



1169

65



1885		ITEMS	FOLIO	✓	DEBITS	DATE	ITEMS	FOLIO	✓	CREDITS
June	1	June car source	544		137500	June 25	May Mileage	2711		165178
	30	"	5453		3500	30	May car source	2710		2710
	30	Regist to June 4th Mileage	5548		1336					12438
					1107075					
July	1	July car source	6108		137500	July 25	Apr May June Mileage	3253		138290
	31	June	6568		2547	31	May June car source	3240		5133
						31	June	3241		642
Aug	1	Aug car source	7103		137500	Aug 30	June July car source	3702		2573
	15	Apr May	7232		3490	30	"	3703		2061
	26	July	7421		11089	30	July	3704		2129
					40000004	30	July	3705		2129
						30	June July	3706		2933
						30	June	3707		183
						25	Apr to July Mileage	3724		137782
						31	July	3770		8245
Sept	1	Sept car source	8000		137500					406576
	30	"	8450		2200					
					4398					
						Sept 15	July car source	4436		887
						25	Aug Mileage	4215		127736
						30	Aug Sept car source	4284		3016
						30	July Aug	4336		47
Oct	1	Oct car source	9045		137500					4348126
	18	Aug Sept car	9315		28355					
	31	Oct	9821		1065					
					20644					
						Oct 25	Sept Mileage	4677		135176
						25	Aug car source	4648		266
										15142
Nov	1	Nov car source	10048		137500					
						Nov 25	Oct Nov car source	5202		358
						25	Aug Sept Oct Mileage	5248		166654

A 3121
BAGGAGE S.A.

1935

ITEMS

POLIO

DEBITS

DATE

ITEMS

POLIO

CREDITS

the

the car June

11105

137500

FILE

(Deposition of Mr. Arthur A. Solenke.)

The following additional portions of the testimony of Mr. Solenke, a witness called by the plaintiff, were offered and read by the defendant:

Cross Examination.

By Mr. Smith, Counsel for the Defendant:

The credit items on the mileage sheets that I have been testifying about are submitted to the Accounting Department by the Traffic Department. I do not know whether or not they are correct. I do not know whether the Traffic Department obtains those figures and a check is made by it of the car movements or whether it in turn gets the figures from someone else. I do not know what the source of the figures is. I simply know that they are turned over to me by the Traffic Department and I enter them on this ledger. The figures entered here are the figures they actually gave me, and whether the figures they actually gave me are correct I do not know.

The following additional portion of the testimony of Witness Solenke was read by Mr. Williamson:

Redirect Examination.

By Mr. Williamson:

I sent out checks to people in accordance with those figures. I do not know of any incorrect figures shown on any of those ledger sheets.

(Deposition of Mr. Arthur A. Solenke.)

Mr. Williamson thereupon introduced into evidence the assignment from the El Dorado Oil Works to the El Dorado Terminal Company of the claim which it is alleged in the complaint was assigned in the amount of \$1550.00 and which is part of the amount claimed in this action. The assignment was received by the court and marked

PLAINTIFF'S EXHIBIT 2.

The assignment reads as follows:

ASSIGNMENT OF CLAIM.

For Value Received, the undersigned El Dorado Oil Works, hereby transfers and assigns unto the El Dorado Terminal [61] Company all that certain claim against General American Tank Car Corporation, which claim amounts to Fifteen Hundred Fifty and 16/100 Dollars (\$1550.16); also all claims and demands against said General American Tank Car Corporation arising out of a contract made and entered into September 28, 1933 between General American Tank Car Corporation and El Dorado Oil Works, in respect of mileage payments collected and received between January 1, 1934 and October 31, 1934 by General American Tank Car Corporation for account of tank cars leased.

Dated: San Francisco, May 1, 1935.

EL DORADO OIL WORKS,

By W. F. WILLIAMSON

Vice President

(Deposition of Mr. Arthur A. Solenke.)

Mr. Williamson thereupon introduced into evidence a paper setting forth certain tariff items. The paper was received by the court by stipulation of counsel and marked plaintiff's exhibit No. 3. It was stipulated by counsel in open court that particular published tariff items were as set forth in the exhibit and were in effect in the manner and during the period therein indicated. It was stipulated by counsel in open court that the last two pages of the exhibit, namely, pages 7 and 8, were not in effect during the period covered by this suit. It was further stipulated by counsel that the item in effect from September 28th, 1933, until May 15th, 1934 corresponds to and was verbatim as item No. 70, Rule No. 1 as set forth in said exhibit.

Such

PLAINTIFF'S EXHIBIT No. 3

reads as follows:

**EL DORADO TERMINAL COMPANY V.
GENERAL AMERICAN TANK CAR
CORPORATION**

Memorandum containing copies of Mileage Payment Rules on tank cars from May 15, 1934 to date, as published in Tariffs of the American Railway Association. [62]

(Deposition of Mr. Arthur A. Solenke.)

All items reproduced below are or were published in Mileage Tariffs of the American Railway Association Tariff Bureau, B. F. Jones, Agent.

The rules reproduced below are all headed by a notation reading as follows:

(Applies only on tank cars of private ownership)

Item No. 70, Rule 1.

Effective May 15, 1934.

Mileage Tariff No. 7-I, I. C. C. No. 2692.

Item No.	Rule No.
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RULES

PAYMENT OF MILEAGE

70

(a) Mileage for the use of cars of private ownership will be paid to the car owner or to the party who has acquired the car or cars, as shown by the permanent reporting marks (see Note) for loaded and empty movement, provided cars are properly equipped and marked with the name of the owner or lessee and proper reporting marks or initials and car number.

(b) Mileage will be paid to the car owner by other than the lessee on cars leased to or rented outright by a railroad company until the cars have been re-marked with the name and the proper reporting marks of the lessee railroad company.

(page 1)

Note.—Acquirement or ownership will be identified by the permanent reporting marks painted or stenciled on the body of the car. When reporting mileage allowances, the carding, placarding or boarding of cars will not be recognized as evidencing their acquirement or ownership. To avoid confusion incidental to similarity of initials, car owners should obtain assigned reporting marks from the Transportation Division of the American Railway Association.

(Deposition of Mr. Arthur A. Solenke.)

Item No. 70-A (Cancels 70), Rule No. 1.

Effective October 1, 1934.

Mileage Tariff No. 7-1, I. C. C. No. 2692, Supplement No. 1.

Item No.	Rule No.
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RULES

PAYMENT OF MILEAGE

†(a) Mileage for the use of cars of private ownership will be paid for loaded and empty movement to the car owner or to the party who has acquired the car or cars, provided cars are properly equipped and marked with the assigned reporting marks. (see Note), and car number and provided, further, that the marked capacities and assigned reporting marks are properly published in the Official Railway Equipment Register I. C. C.—R. E. R. No. 241, issued by G. P. Conard, Agent, and the gallonage capacities in Circular 6-V, I. C. C. A-2297, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof.

(b) Mileage will be paid to the car owner by other than the lessee on cars leased to or rented outright by a railroad company until the cars have been re-marked with the name and the proper reporting marks of the lessee railroad company.

*Note.—Acquirement or ownership will be identified by the assigned reporting marks painted or stenciled on the body of the car. Car owners must obtain such reporting marks from the Transportation Division of the American

(10) Effective October 1, 1934.

(page 2)

Railway Association. When reporting mileage allowances, the carding, placarding or boarding of cars will not be recognized as evidencing their acquirement or ownership.

†Increase.

*Denotes changes in wording which result in neither increases nor reductions.

(Deposition of Mr. Arthur A. Solenke.)

Item No. 70-B (Cancels 70 and 70-A), Rule No. 1.

Effective October 1, 1934.

Mileage Tariff No. 7-I, I. C. C. No. 2692, Supplement No. 2.

Item No.	Rule No.
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RULES

PAYMENT OF MILEAGE

†(a) Mileage for the use of cars of private ownership will be paid for loaded and empty movement to the car owner or to the party who has acquired the car or cars, provided cars are properly equipped and marked with the assigned reporting marks (see Note), and car number and provided, further, that the marked capacities and assigned reporting marks are properly published in the Official Railway Equipment Register I. C. C.—R. E. R. No. 241, issued by G. P. Conard, Agent, and the gallonage capacities in Circular 6-V, I. C. C. A-2297, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof, except that the gallonage capacities of cars, designed and used exclusively for handling of commodities on which weights and charges are arrived at by weight and not by gallonage capacity of cars, need not be published in Circular No. 6-V, I. C. C. No. A-2297, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof.

(10)
70-B
Cancels 1
70
and
70-A

(b) Mileage will be paid to the car owner by other than the lessee on cars leased to or rented outright by a railroad company until the cars have been re-marked with the name and the proper reporting marks of the lessee railroad company.

Note. Acquisition or ownership will be identified by the assigned reporting marks painted or stenciled on the body of the car. Car owners must obtain such reporting marks from the Transportation Division of the American Railway Association. When reporting mileage allowances, the carding, placarding or boarding

(Deposition of Mr. Arthur A. Solenke.)

of cars will not be recognized as evidencing their acquirement or ownership.

†Increase.

(10) Effective October 1, 1934. Issued on one day's notice under special permission of the Interstate Commerce Commission No. 139062 of September 26, 1934.

(page 3)

Item No. 70-C. (Cancels 70-B), Rule No. 1.

Effective November 1, 1934.

Mileage Tariff No. 7-I, I. C. C. No. 2692, Supplement No. 3.

[65]

Item Rule
No. No.

RULES

PAYMENT OF MILEAGE

†(a) Mileage for the use of cars of private ownership will be paid for loaded and empty movements only to the car owner—not to a lessee—provided cars are properly equipped and marked with the assigned reporting marks (see Note), and car number and provided, further, that the marked capacities, lengths, cubical capacities and assigned reporting marks are properly published in the Official Railway Equipment Register I. C. C.—R, E. R. No. 241, issued by G. P. Conard, Agent, and the gallonage capacities in Circular No. 6-V, I. C. C. No. A-2297, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof, except that the gallonage capacities of cars, designed and used exclusively for handling of commodities on which weights and charges are arrived at by weight and not by gallonage capacity of cars, need not be published in Circular No. 6-V, I. C. C. No. A-2297, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof.

(3)
70-C
Cancels 1
70-B

(b) Mileage will be paid to the car owner by other than the lessee on cars leased to or rented

(Deposition of Mr. Arthur A. Solenke.)

outright by a railroad company until the cars have been re-marked with the name and the proper reporting marks of the lessee railroad company.

†Note.—Ownership will be identified by the assigned reporting marks painted or stenciled on the body of the car. Car owners must obtain such reporting marks from the Transportation Division of the American Railway Association. When reporting mileage allowances, the carding, placarding or boarding of cars will not be recognized as evidencing their ownership.

†Denotes changes in wording which result in neither increases nor reductions.

(3) Effective November 1, 1934.

(page 4)

Item No. 70-D, (Cancels 70-C and 70-B), Rule No. 1.

Effective November 1, 1934.

Mileage Tariff No. 7-I, I. C. C. No. 2692, Supplement No. 5.

[66]

Item
No. Rule
No.

RULES

PAYMENT OF MILEAGE

- (a) Mileage for the use of cars of private ownership will be paid for loaded and empty movement to the car owner or to the party who has acquired the car or cars, provided cars are properly equipped and marked with the assigned reporting marks (see Note), and car number and provided, further, that the marked capacities and assigned reporting marks are properly published in the Official Railway Equipment Register I. C. C.—R. E. R. No. 241, issued by G. P. Conard, Agent, and the gallonage capacities in Circular 6-V, I. C. C. A-2297, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof, except that the gallonage capacities of cars, designed and used exclusively for
- (4)
70-D
Cancels
70-C
and
70-B
- 1

(Deposition of Mr. Arthur A. Solenka.)

handling of commodities on which weights and charges are arrived at by weight and not by gallonage capacity of cars, need not be published in Circular No. 6-V, I. C. C. No. A-2297, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof.

(b) Mileage will be paid to the car owner by other than the lessee on cars leased to or rented outright by a railroad company until the cars have been remarked with the name and the proper reporting marks of the lessee railroad company.

Note.—Acquirement or ownership will be identified by the assigned reporting marks painted or stenciled on the body of the car. Car owners must obtain such reporting marks from the Transportation Division of the American Railway Association. When reporting mileage allowances, the carding, placarding or boarding of cars will not be recognized as evidencing their acquirement or ownership.

(4) Effective November 1, 1934. Issued on one day's notice under special permission of the Interstate Commerce Commission No. 139872 of October 29, 1934.

(page 5)

Item No. 70-E (Cancels 70-D), Rule No. 1.

Effective April 1, 1935.

Mileage Tariff No. 7-I, I. C. C. No. 2692, Supplement No. 7.

[67]

Item No.	Rule No.
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RULES

PAYMENT OF MILEAGE

(a) Mileage for the use of cars of private ownership will be paid for loaded and empty movements only to the car owner—not to a lessee—provided cars are properly equipped and

(Deposition of Mr. Arthur A. Solenke.)

marked with the assigned reporting marks and car number and provided, further, that the marked capacities and assigned reporting marks are properly published in the Official Railway Equipment Register I. C. C.—R. E. R. No. 241, issued by G. P. Conard, Agent, and the gallonage capacities in Freight Tariff 300, I. C. C. No. A2518, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof, except that the gallonage capacities of cars, designed and used exclusively for handling of commodities on which weights and charges are arrived at by weight and not by gallonage capacity of cars, need not be published in Freight Tariff 300, I. C. C. No. A2518, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof.

150-E
Cancels 1
70-D

(b) Reporting marks will be assigned to car owners, only, by the Secretary, Transportation Division, Association of American Railroads, upon written application. Such marks may be used, also, on cars operated but not owned by the party to whom the marks are assigned, and, when so used, such cars and the name and address of the owner, to whom the mileage will be paid, must be shown by the assignee in his registration in the Official Railway Equipment Register, I. C. C.—R. E. R. No. 241, issued by G. P. Conard, Agent, supplements thereto or reissues thereof.

(c) Assigned reporting marks must be painted or stenciled on the body of the car. When reporting mileage allowances, the carding, placarding or boarding of cars will not be recognized.

†Denotes changes in wording which result in neither increases nor reductions.

(Deposition of Mr. Arthur A. Solenke.)

Item No. 100, Rule No. 1.

Effective August 29, 1935.

Mileage Tariff No. 7-J, I. C. C. No. 2791.

[68]

Item No.	Rule No.
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RULES

PAYMENT OF MILEAGE

(a) Mileage for the use of cars of private ownership will be paid for loaded and empty movements only to the car owner—not to a lessee—provided cars are properly equipped and marked with the assigned reporting marks and car number and provided, further, that the marked capacities, and assigned reporting marks are properly published in the Official Railway Equipment Register I. C. C.—R. E. R. No. 241, issued by G. P. Conard, Agent, and the gallonage capacities in Freight Tariff 300, I. C. C. No. A-2518, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof, except that the gallonage capacities of cars, designed and used exclusively for handling of commodities on which weights and charges are arrived at by weight and not by gallonage capacity of cars, need not be published in Freight Tariff 300, I. C. C. No. A-2518, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof.

100

1

(b) Reporting marks will be assigned to car owners only, by the Secretary, Transportation Division, Association of American Railroads, upon written application. Such marks may be used, also, on cars operated but not owned by the party to whom the marks are assigned, and, when so used, such cars, and the name and address of the owner, to whom the mileage will be paid, must be shown by the assignee in his registration in the Official Railway Equipment Register, I. C. C.—R. E. R. No. 241, issued by

(Deposition of Mr. Arthur A. Solenke.)

G. P. Conard, Agent, supplements thereto or reissues thereof.

(c) Assigned reporting marks must be painted or stenciled on the body of the car. When reporting mileage allowances, the carding, placarding or boarding of cars will not be recognized.

(page 7)

Item No. 100-A (Cancels 100), Rule No. 1.

Effective January 15, 1936.

Mileage Tariff No. 7-J, I. C. C. No. 2791.

[69]

Item No.	Rule No.
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RULES

PAYMENT OF MILEAGE

(a). Mileage for the use of cars of private ownership will be paid for loaded and empty movements only to the car owner—not to a lessee—provided cars are properly equipped and marked with the assigned reporting marks and car number and provided, further, that the marked capacities and assigned reporting marks are properly published in the Official Railway Equipment Register I. C. C.—R. E. R. No. 241, issued by G. P. Conard, Agent, and the gallonage capacities in Freight Tariff 300, I. C. C. No. A-2518, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof, except that the gallonage capacities of cars, designed and used exclusively for handling of commodities on which weights and charges are arrived at by weight and not by gallonage capacity of cars, need not be published in Freight Tariff 300, I. C. C. No. A-2518, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof.

(Deposition of Mr. Arthur A. Solenke.)

(50) (b) Reporting marks will be assigned to car
100-A owners only, by the Secretary, Transportation
Cancels 1 Division, Association of American Railroads,
100 upon written application. Such marks may be
used, also, on cars operated but not owned by
the party to whom the marks are assigned, and,
when so used, such cars and the name and ad-
dress of the owner, to whom the mileage will
be paid, must be shown by the assignee in his
registration in the Official Railway Equipment
Register, I. C. C.—R. E. R. No. 241, issued by
G. P. Conard, Agent, supplements thereto or
reissues thereof.

(c) Assigned reporting marks must be painted
or stenciled on the body of the car. When re-
porting mileage allowances, the carding, placard-
ing or boarding of cars will not be recognized.

(50) Effective January 10, 1936, Issued un-
der authority of the Railroad Commission of the
State of California, No. 63-11739 of October 7,
1935."

(page 8)

It was further stipulated between counsel that
the Transcontinental Freight Bureau, Eastbound
Tariff No. 3-G, Item No. 404, Section 1 effective
October 1st, 1933 reads as follows:

"Rates provided for freight in tank cars
do not obligate the carriers to furnish tank
cars." [70]

and it was further stipulated that all succeeding
freight tariffs and their supplements in effect from
September 28th, 1933 until the commencement of
this suit in June, 1935 contained a provision reading
exactly the same.

MR. DOUGLASS M. BARROWS

was then recalled by Mr. Matthew for further cross-examination and testified as follows:

Cross Examination

By Mr. Matthew:

In connection with my prior testimony that in practically all instances the freight charges on shipments of cocoanut oil from the plant of the El Dorado Oil Works to destinations out of the state were paid by the consignee, I state that prior to the date of the assignment of this contract the El Dorado Oil Works appeared as the consignor on the bills of lading and that since then El Dorado Terminal Company has appeared as the consignor upon the bills of lading. The larger number of the shipments were under order/notify bills of lading, and not straight bills of lading. When the shipments were made under order/notify bills of lading they were to the order of either El Dorado Oil Works or El Dorado Terminal Company, notify the consignee. In other words, prior to the assignment the El Dorado Oil Works was the consignor and the shipments were billed to the El Dorado Oil Works, notify/some designated party. After the assignment the El Dorado Terminal Company appeared as the consignor and likewise consignee, with the instruction 'notify' some third party. Those bills of lading were customarily forwarded with a sight draft attached to some bank in the city of destination, and in due course the notified party would appear at the bank and pay the sight

(Testimony of Mr. Douglass M. Barrows.)

draft and receive the bill of lading. When I said that the freight charges were ordinarily paid by the consignee I meant this party designated as a notify/party in the bill of lading for whom the shipment was intended. [71]

Thereupon and at the close of the trial but before oral argument by counsel, Mr. Williamson stated as follows: 'I am going to ask your Honor for findings on certain questions in this case, which are typewritten, and which are served upon opposing counsel. I would like to file these with the clerk as request to have findings made on those points.'

The Court: Special findings?

Mr. Williamson: Special findings.

Such findings read as follows:

"[Title of District Court and Cause.]

PROPOSED FINDINGS

Plaintiff requests of the Court findings to the following effect:

1. That plaintiff is entitled to judgment against defendant in the sum of \$18,532.78, being the sum admitted by defendant and accepted by plaintiff as correct, together with interest thereon at 7% annually from the dates when due, and with plaintiff's costs herein.

2. That there was no prohibition in the so-called Elkins Act, either at the date of the execution of the contract in question, or at any time up to the date of trial, applicable to the payment of mileage

earned by tank cars used as said tank cars were used by the El Dorado Oil Works or the El Dorado Terminal Company under the terms of the contract with defendant [72] General American Tank Car Corporation.

3. That there was nothing in the railroad tariffs or in any regulation of the railroads or otherwise, prohibiting payment of mileage earned by the lessee of tank cars prior to August 29, 1935.

4. That the freight on all of the cars leased by the El Dorado Oil Works and for plaintiff from the defendant General American Tank Car Corporation under the said agreement of September 28, 1933, was paid in the amounts and at the time and in all respects as required by the applicable railroad tariffs.

5. That all said freight money was paid by the consignee of the goods shipped by El Dorado Oil Works and/or El Dorado Terminal Company, and that none of said consignees was a party to the said contract between the El Dorado Oil Works and General American Tank Car Corporation or party to any contract whatsoever in respect of the rental or use of said tank cars.

6. That neither at the time that said contract between the El Dorado Oil Works and General American Tank Car Corporation was made; nor at the time that the said contract was to take effect, to-wit January 1, 1934; nor at any time during the period covered by plaintiff's claims against General American Tank Car Corporation was there any rule, regulation or order of the Interstate

Commerce Commission prohibiting the making or carrying out of such contract, or the payment or credit by the General American Tank Car Corporation to its lessee of mileage earned, as provided in said contract.

7. That at the time the contract involved herein was made, on September 28, 1933, and at all times since, the railroads serving the San Francisco Bay Area have never held themselves out or been obligated by published tariffs or otherwise to furnish or provide tank cars of the type used or capable of being used for [73] shipping cocoanut oil from shippers in the Bay Area to consignees in the areas to which the El Dorado Oil Works oil was shipped.

8. That said railroads, during the above mentioned period, have been unable and have not had the equipment or facilities to meet even a small part of the tank car requirements of shippers of cocoanut oil from the Bay Area.

9. That General American Tank Car Corporation during said period had no relation with said railroads as to tank cars leased under said contract except as to checking the movement of said tank cars and receiving mileage earnings according to the published tariffs.

10. That neither the contract in question, nor the agreement to credit and pay over certain mileage earnings by General American Tank Car Corporation, nor the credit or payment over of such earnings was or is illegal, or in violation of

or prohibited by the so-called Elkins Act or any regulation or order made thereunder.

Respectfully submitted

WILLIAMSON & WALLACE

Attorneys for Plaintiff

The court failed to make any of the aforesaid proposed findings requested by plaintiff.

Thereafter plaintiff submitted an opening brief, defendant submitted a brief in its behalf, and plaintiff submitted a reply brief. The case was thereafter orally argued to the court, and thereupon counsel for both parties submitted the cause to the court for its judgment and decision.

Thereafter the court, after due consideration, rendered its decision that plaintiff take nothing by its said action and that special findings of fact and conclusions of law would be made. Thereafter the court made and filed its findings [74] of fact and conclusions of law, in words and figures as follows:

“[Title of District Court and Cause.]

**FINDINGS OF FACT AND CONCLUSIONS
OF LAW**

The above entitled cause came on regularly for trial and was tried before the Court, Honorable Harold Louderback sitting as Judge thereof, a jury having been waived by written stipulation filed by the parties. The parties appeared by their re-

spective counsel and evidence, both oral and written, was introduced. The cause was argued orally and upon briefs and duly submitted for decision. The Court having considered the evidence and the law applicable thereto and being fully advised in the matter, hereby makes its decision and its findings of fact and conclusions of law.

Findings of Fact

The Court finds the facts to be as follows:

I.

Plaintiff is a corporation, wholly owned and controlled by El Dorado Oil Works, a corporation engaged in the production and shipment of coconut oil. Defendant, General American Tank Car Corporation, is the owner of certain tank cars and is engaged, among other things, in furnishing these cars [75] under contract to shippers for the transportation of coconut oil and other liquid commodities.

II.

On September 28, 1933, defendant entered into a written agreement with El Dorado Oil Works with respect to the furnishing of tank cars for use by said El Dorado Oil Works in the transportation of its products. A copy of said agreement is attached as "Exhibit A" to defendant's answer to the complaint. On or about October 31, 1934, said El Dorado Oil Works assigned and transferred all of its right, title and interest in and to said agreement, and in the cars therein referred to, to plaintiff. Defendant consented to said assign-

ment. Plaintiff has been a wholly owned and controlled subsidiary of said El Dorado Oil Works at all times since the making of said assignment. Prior to the commencement of this action and on May 1, 1935, said El Dorado Oil Works duly assigned and transferred to plaintiff by written instrument all claims and demands of said El Dorado Oil Works against defendant arising out of said agreement.

Under said agreement defendant leased to said El Dorado Oil Works 50 tank cars, which are referred to in the agreement as 'permanent cars', at the rental of \$27.50 per car per month. The said agreement also provided that defendant would furnish said El Dorado Oil Works its entire requirement of tank cars over and above the 50 permanent cars, at a rental of \$30. per car per month. It was further provided that defendant should each month credit to the rental or service account of said El Dorado Oil Works all mileage earned by the cars while in the service of said El Dorado Oil Works according and subject to all rules of the tariffs of the railroad common carriers over whose lines said cars should be transported. The said agreement was to remain in effect for a period of three years beginning [76] January 1, 1934, and ending December 31, 1936. The said El Dorado Oil Works was given the right to extend the term of said agreement for an additional two years provided it gave defendant notice in writing on or before December 1, 1936 of its election so to extend said agreement.

III.

The tank cars leased by defendant to said El Dorado Oil Works and to plaintiff as provided in said agreement were used during the times specified in said complaint in the transportation of property of said El Dorado Oil Works and of plaintiff over the lines of railway of common carriers subject to that certain statute of the United States of America entitled 'An Act to further regulate commerce with foreign nations and among the states' (32 Stat. L. 847; 34 Stat. L. 584; U. S. Code Annotated, Title 49, Sec. 41), commonly known as the Elkins Act. Such transportation was almost entirely in interstate or foreign commerce. More specifically, ninety-nine (99) per cent or more of said shipments in said tank cars were interstate in character. Under the terms of the tariffs of said common carriers published and filed with the Interstate Commerce Commission in the manner required by law certain mileage payments were and are made by such carriers for the use of privately owned cars employed in the transportation of property over the lines of railway of such common carriers according as their respective lines of railway may run.

IV.

During the period extending from January 1, 1934, to June 30, 1934, it was the practice of defendant under said agreement to credit to said El Dorado Oil Works all of the mileage earnings collected and received on said tank cars from said common carriers and to pay over to said El Do-

rado Oil Works each [77] month all of said mileage earnings in excess of the car hire or rental reserved in said agreement. On July 2, 1934, the Interstate Commerce Commission rendered its decision in I. & S. Docket No. 3887, *Use of Privately Owned Refrigerator Cars*, 201 I.C.C. 323. A copy of said decision, marked 'Exhibit 1', is attached to and made a part of the stipulation of facts entered into between plaintiff and defendant and presented in this proceeding. Following the rendition of said decision defendant was advised by counsel and concluded that the crediting and payment to plaintiff of mileage earnings, received from the aforesaid railroad companies, in excess of the car hire or rental reserved in said agreement was prohibited by and would be in violation of said Elkins Act. As a consequence of such decision and such advice and conclusion defendant has refused to pay over to said El Dorado Oil Works or to plaintiff such excess mileage earnings collected by defendant after May 31, 1934.

V.

During the period from the 1st day of January, 1934, to and including the 31st day of October, 1934, defendant collected and received from the railroad companies, over whose lines of railway the shipments involved were transported, the sum of \$22,807.79 and credited thereof the sum of \$21,889.14 to the account of El Dorado Oil Works. The amount of the mileage earnings, in excess of the car rental, withheld by defendant for said period was and is

the sum of \$918.65. During the period between the 1st day of November, 1934, and the 31st day of May, 1935, defendant collected and received from the railroad companies, over whose lines of railway the shipments involved were transported, the sum of \$28,595.79 and credited thereof, the sum of \$10,981.66 to the account of plaintiff. The amount of the mileage earnings, in excess of the car [78] rental, withheld by defendant for said period was and is the sum of \$17,614.13. The total mileage earnings, in excess of the car rental, withheld by defendant for the entire period from January 1, 1934, to May 31, 1935, were and are the sum of \$18,532.78. Defendant has credited said El Dorado Oil Works and plaintiff with all of the mileage earnings in the complaint and in said agreement referred to, in an amount or amounts equal to the car hire or rental reserved in said agreement.

VI.

There was and is no corporate relationship between defendant, General American Tank Car Corporation, and any of said rail carriers over whose lines of railway said shipments of El Dorado Oil Works and plaintiff were transported.

CONCLUSIONS OF LAW

From the foregoing facts the Court concludes:

I.

That defendant was and is prohibited and enjoined by law, and particularly by the provisions

of that certain statute of the United States of America entitled 'An Act to further regulate commerce with foreign nations and among the states' (32 Stat. L. 847; 34 Stat. L. 584; U. S. Code Annotated, Title 49, Sec. 41), commonly known as the Elkins Act, from crediting or paying to either plaintiff or El Dorado Oil Works any mileage earnings received from said common carriers in excess of said car hire or rental reserved in said agreement.

II.

That, if defendant were to credit or to pay over to plaintiff or to said El Dorado Oil Works any part of the mileage payments received from said common carriers by defendant, as the owner of said tank cars, in excess of the car hire or [79] rental reserved in said agreement, such credit or payment would be unlawful in that plaintiff or said El Dorado Oil Works would secure the transportation of property at rates less than the rates named in the published and filed tariffs of said common carriers applicable to such transportation, thereby obtaining a rebate or concession and an advantage or discrimination, in violation of the provisions of said Elkins Act.

III.

That plaintiff was lawfully entitled to receive and defendant was lawfully required to pay over to plaintiff under the terms and provisions of said agreement only such car mileage earnings as were not in excess of the car hire or rental reserved in said agreement.

IV.

That defendant is entitled to judgment herein and to recover against plaintiff its costs herein incurred.

HAROLD LOUDERBACK

District Judge

Approved as to form, as provided in Rule 22.

WILLIAMSON & WALLACE

Attorneys for Plaintiff."

Thereafter and on September 2, 1937 the Court made and entered judgment whereby it was ordered and adjudged that plaintiff taken nothing by its said action and that defendant have and recover from plaintiff its costs and disbursements. [80]

Within ten days after service upon plaintiff of written notice of entry of judgment in this cause, the above entitled court did, with written consent of counsel for defendant, by its order duly given and rendered, made and filed herein, extend the time within which plaintiff might prepare, serve and lodge its draft of its bill of exceptions herein for twenty days and the above entitled court did, with written consents of counsel for defendant, and within said twenty days extension and within each successive extension similarly duly given, by its orders duly given, rendered, made and filed herein, successively extend the time within which the plaintiff might prepare, serve and lodge its draft of its bill of

exceptions herein to and including the 13th day of November, 1937.

The foregoing constitutes all of the proceedings had herein.

Within the time required by the law and the rules and orders of the court herein, and on the 12th day of November, 1937, plaintiff El Dorado Terminal Company, a corporation, duly served, presented and lodged herein its proposed bill of exceptions for examination by defendant and appellee and for approval of the Court.

Thereafter and within the time required by law and the rules of the above-entitled court as enlarged and extended by stipulation of the parties and on the 15th day of January, 1938, defendant and appellee duly served, presented, and lodged its proposed amendments to the proposed bill of exceptions of plaintiff and appellant. Thereafter and on the 17th day of January, 1938 plaintiff and appellant served and on the 18th day of January, 1938, filed herein its Notice of Presentation of said bill of exceptions and proposed amendments thereto, of which the following is a copy:

Receipt of a copy of the within
Notice is hereby acknowledged this
17th day of January, 1938.

MCCUTCHEN, OLNEY, MANNON & GREENE
Attorneys for Defendant. [81]

[Title of District Court and Cause.]

NOTICE OF PRESENTATION OF BILL
OF EXCEPTIONS AND AMENDMENTS

To the Defendant Above Named, and to Messrs.
McCutchen, Olney, Mannon & Greene, Its
Attorneys:

You and each of you will please take notice, that
on the 24th day of January, 1938, at the hour of ten
o'clock A. M., or as soon thereafter as counsel may
be heard, plaintiff and appellant, El Dorado Ter-
minal Company will present to the Honorable
Harold Louderback, at his Courtroom in the Fed-
eral Post Office Building at San Francisco, Cali-
fornia, its Proposed Bill of Exceptions in the above
entitled action together with amendments proposed
by defendant above named for settlement.

Dated: January 17, 1938

WILLIAMSON & WALLACE
Attorneys for Plaintiff

[Endorsed]: Filed January 18, 1938

Thereafter and pursuant to successive stipulations
of the parties the presentation of said bill of excep-
tions and proposed amendments was continued to
February 15, 1938, on which date, pursuant to said
Notice and said stipulation, said bill of [82] excep-
tions and said proposed amendments was duly pre-
sented to the court and to the judge thereof who
tried the above-entitled cause. Said court on that

said proposed amendments, and allowed certain of said proposed amendments and disallowed others thereof.

By stipulation and order filed herein on November 15, 1937, the term of court and the time within which plaintiff and appellant might have a Bill of Exceptions settled and allowed was enlarged and extended to and including the 12th day of January, 1938, and by stipulation and order filed herein on January 4, 1938 said times and term were extended and enlarged to including the 25th day of January, 1938, and by stipulation and order filed herein on January 18, 1938, said times and term were enlarged and extended to and including the 25th day of February, 1938, and by stipulation and order filed herein on February 24th, 1938, said times and term were continued to and including the 25th day of March, 1938. Copies of said stipulations and orders follow:

[Title of District Court and Cause.]

STIPULATION AND ORDER

It is hereby stipulated by and between the parties hereto that the time within which plaintiff and appellant, El Dorado Terminal Company, a corporation, may have a Bill of Exceptions settled and allowed is enlarged and extended to and including the 12th day of January, 1938, and the term of Court is extended and enlarged accordingly, and to said day.

Dated: November 12, 1937.

WILLIAMSON & WALLACE

Attorneys for Plaintiff and
Appellant

McCUTCHEN, OLNEY

MANNON & GREENE

Attorneys for Plaintiff and
Appellant

It Is So Ordered, Nov. 15, 1937.

HAROLD LOUDERBACK

District Judge

0 days previous extension by stipulation.

[Endorsed]: Filed November 15, 1937;

[83]

[Title of District Court and Cause.]

STIPULATION AND ORDER

It Is Hereby Stipulated by and between the parties hereto that the time within which plaintiff and appellant, El Dorado Terminal Company, a corporation, may have a Bill of Exceptions settled and allowed is enlarged and extended to and including the 25th day of January, 1938, and the term of Court is extended and enlarged accordingly, and to said day.

Dated: January 4, 1938.

WILLIAMSON & WALLACE

Attorneys for Pltf. and Applt.

McCUTCHEN, OLNEY,

MANNON & GREENE

Attorneys for Deft. and

Applee.

It Is So Ordered Jan. 4, 1938.

HAROLD LOUDERBACK

District Judge.

60 days previous extension by stipulation.

[Endorsed]: Filed Jan. 4, 1938.

[Title of District Court and Cause.]

STIPULATION AND ORDER

It Is, Hereby Stipulated by and between the parties hereto that the time within which plaintiff and appellant, El Dorado Terminal Company, a corporation, may have a Bill of Exceptions settled and allowed is enlarged and extended to and including the 25th day of February, 1938, and the term of Court is extended and enlarged accordingly, and to said day.

Dated: January 18, 1938.

WILLIAMSON & WALLACE

Attorneys for Pltf. and Applt.

McCUTCHEN, OLNEY,

MANNON & GREENE

Attorneys for Deft. and

Applee.

It Is So Ordered Jan. 18, 1938.

HAROLD LOUDERBACK

District Judge.

55 days previous extension by stipulation.

[Endorsed]: Filed Jan. 20, 1938.

[84]

[Title of District Court and Cause.]

STIPULATION AND ORDER

It Is Hereby Stipulated by and between the parties hereto that the time within which plaintiff and, appellant, El Dorado Terminal Company, a corporation, may have a Bill of Exceptions settled and allowed is enlarged and extended to and including the 28th day of March, 1938, and the term of Court is extended and enlarged accordingly, and to said day.

Dated: February 23, 1938.

WILLIAMSON & WALLACE

Attorneys for Pltf. and Applt.

McCUTCHEN, OLNEY,

MANNON & GREENE

Attorneys for Deft. and
Applee.

It Is So Ordered Feb. 24, 1938.

HAROLD LOUDERBACK

District Judge.

85 days previous extension by stipulation.

[Endorsed]: Filed Feb. 24, 1938.

By stipulation and order duly filed in the U. S. Circuit Court of Appeals for the Ninth Circuit on December 18, 1937, the time within which plaintiff and appellant might file its transcript and record on appeal, the time within which it might file its record in said Circuit Court of Appeals, the time for docketing its cause in said court and the return day on the citation issued upon the allowance of its said appeal was duly extended and enlarged to and including the 25th day of January, 1938, and by stipulation and order duly filed on January 20, 1938, said times were duly extended and enlarged to and including the 25th day of February, 1938, and by stipulation and order duly filed on February 24, 1938 said times were duly extended and [85] enlarged to and including the 28th day of March, 1938.

And Now, within the time required by law and the rules and orders of the court herein, the plaintiff and appellant having presented its proposed bill of exceptions and defendant and appellee having proposed amendments thereto and the court having ruled thereon and determined upon the contents of the engrossed bill of exceptions, plaintiff and appellant El Dorado Oil Works, a corporation, presents and lodges the foregoing engrossed bill of exceptions for settlement and approval by the court.

Wherefore, it is prayed that this engrossed Bill of Exceptions be settled, allowed and approved as plaintiff's Bill of Exceptions on its appeal from the

Order and Judgment in the above entitled action, and for all purposes for which a Bill of Exceptions may be used, and to the end that the foregoing matters may be made matters of record.

Dated: March 14th, 1938.

WILLIAMSON & WALLACE
Attorneys for Plaintiff. [86]

CERTIFICATE AND ORDER SETTLING,
ALLOWING AND APPROVING
ENGROSSED BILL OF EXCEPTIONS

I, Harold Louderback hereby certify that I am a Judge of the United States District Court for the Northern District of California, designated and assigned to sit and act as recited in the foregoing Engrossed Bill of Exceptions; that the above entitled cause was tried before me, sitting without a jury and in the said and above entitled Court, and that all of the proceedings had therein, and all proceedings and other matters had and which happened as recited in the foregoing Engrossed Bill of Exceptions were had and happened before me, sitting as aforesaid, (excepting only matters recited in respect of removal of the above entitled cause into the above entitled Court as recited in the foregoing Bill of Exceptions which matters appeared of record before me upon the trial of the above entitled cause as recited in the foregoing Bill of Exceptions); that within the term at which the proceedings upon the trial of the above entitled

cause, and within the term at which all of the proceedings herein were had, as recited in the foregoing engrossed Bill of Exceptions and within the time allowed by law and the rules and orders of the Court, plaintiff El Dorado Terminal Company, a corporation, prepared and served upon the defendant above named and lodged herein its foregoing bill of exceptions, and within said time and term this certificate and order of settlement and allowance thereof is made and now, the premises considered and the Court being fully advised,

It Is Hereby Ordered that the prayer of the foregoing Engrossed Bill of Exceptions be and the same is hereby granted; and

It Is Further Ordered, Adjudged and Decreed That the foregoing Engrossed Bill of Exceptions is full, true and [87] correct and contains all of the proceedings in the above entitled cause, all of the proceedings of the trial thereof, and all of the evidence offered and introduced therein;

And It Is Further Ordered, Adjudged and Decreed, that said Engrossed Bill of Exceptions is approved, settled and allowed, and that it be filed and made a part of the record herein, and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, accordingly.

Done this 17th day of March, 1938.

HAROLD LOUDERBACK

United States District Judge

[Endorsed]: Filed: March 18, 1938.

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable the District Court of the United States of America for the Northern District of California, Southern Division:

Petitioner El Dorado Terminal Company, a corporation, plaintiff in the above entitled cause respectfully shows:

The above entitled action was and is an action at law prosecuted against General American Tank Car Corporation, a corporation, and in said action and pursuant to decision and order made on or about July 3, 1937, by the court a judgment in favor [89] of defendant and against plaintiff was given, made and entered on the second day of September, 1937. Said judgment was entered in the office of the Clerk of the above entitled Court in Judgment Register 16 at page 598 thereof.

Your petitioner, El Dorado Terminal Company, a corporation, plaintiff in the above entitled action deems itself aggrieved by the said decision and order of the Court and by the judgment of the Court made and entered thereon and by reason of the actions, rulings and decisions of the above entitled Court during said trial, which said actions, rulings and decisions your petitioner deems were errors committed to the prejudice of your petitioner, all as more particularly set out in the assignment of errors, which is filed herewith. Your petitioner desires to take an appeal from said judgment to the United States Circuit Court of Appeals for

the Ninth Circuit, sitting in San Francisco, State of California, pursuant to provisions of law in such cases made and provided, for the reasons specified in the said assignment of errors which is filed herewith.

Wherefore your petitioner prays that this petition be granted and that said appeal of your petitioner be allowed; that this Court make its order allowing petitioner to prosecute its appeal to the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to the laws of the United States in such cases made and provided, to the end that said assigned errors may be corrected and such decision and judgment may be reviewed and reversed; and that this Court make an order fixing the amount of the cost bond which said plaintiff shall give and furnish upon said appeal; that a citation issue and that a transcript of the record, proceedings, and papers in this cause, duly [90] authenticated, be sent to the said United States Circuit Court of Appeals, sitting at San Francisco, California.

Dated at San Francisco, California, this 26th day of November, 1937.

WILLIAMSON & WALLACE
Attorneys for Plaintiff.

Receipt of a copy of the within Petition for Appeal admitted this 26th day of November, 1937.

**McCUTCHEN, OLNEY,
MANNON & GREENE**

[Endorsed]: Filed: Nov. 26, 1937.

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes Now El Dorado Terminal Company, a corporation, plaintiff in the above entitled cause, by its attorneys Messrs. Williamson & Wallace, and makes and files the following assignment of errors upon which it will rely in the prosecution of its appeal in the above-entitled cause, petition for which appeal is filed at the same time as this assignment of errors, and assigns errors which it deems were errors committed to its prejudice upon the trial of the above-entitled action, as follows: [92]

I.

The Court erred in failing to find and decide as requested by plaintiff during the trial and at the close of all the evidence that plaintiff is entitled to judgment against defendant in the sum of \$18,532.78, being the sum admitted by defendant and accepted by plaintiff as correct, together with interest thereon at 7% per annum from the dates when due, and with plaintiff's costs herein. Said action of the Court was and is against the law and there is insufficient evidence, nor is there any evidence to support or justify that action and the Court could have ruled and decided from the evidence only in favor of plaintiff as requested. Plaintiff requested said ruling and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent substantial and uncontradicted evidence, both oral and documentary, to the following effect:

A true copy of the contract in question between defendant and El Dorado Oil Works is attached to defendant's answer; said contract was assigned by El Dorado Oil Works to the plaintiff on or about October 31st, 1934 and defendant assented thereto; the correct amount, if any, for which judgment could be rendered for plaintiff is \$18,532.78 (Stipulation of counsel);

Prior to commencement of this action El Dorado Oil Works assigned to plaintiff its claim against defendant for \$1552.16 as alleged in the complaint (Plaintiff's Exhibit 2);

There was no corporate relationship between defendant and any railroad over whose lines shipments of cocoanut oil [93] of El Dorado Oil Works and plaintiff were made, and neither El Dorado Oil Works nor plaintiff had any agreement with any railroad carrier with reference to these mileage allowances (Stipulation and admission of counsel);

There was no agreement or other dealings between defendant and the railroads with relation to defendant's tank cars involved herein other than pertaining to checking, routing and collecting mileage for said cars; there was no agreement between said parties pertaining to rebates, and all matters per-

taining to handling and receiving mileage payments upon said cars was done solely in accordance with the applicable published railroad tariffs approved by the Interstate Commerce Commission (Testimony of Messrs. Smith, Kais and Solenke);

The freight upon all shipments in defendant's tank cars during the period in question was paid by the real consignees and never by plaintiff or El Dorado Oil Works who had no dealings with any railroad with regard to freight or mileage payments (Testimony of Mr. Barrows);

Tank cars required for shipping cocoanut oil are of special construction and require special care and El Dorado Oil Works and plaintiff were never able to obtain from railroads serving the area from which cocoanut oil was shipped any tank cars of the requisite type, nor were such cars ever used during the period in question by El Dorado Oil Works or plaintiff (Testimony by Mr. Barrows);

The railroads serving San Francisco Bay area over which plaintiff and El Dorado Oil Works made all their shipments did not possess or have available for use by plaintiff or any other shipper of cocoanut oil from said area tank cars of the particular type required for such transportation; only in rare and isolated instances did these railroads have these cars [94] available and only in such rare cases did the railroads actually furnish their own tank cars to such shippers; plaintiff and other similar shippers were unable to ship their products in railroad tank cars but they were forced to and did

use their own tank cars or cars acquired by them for shipment of their cocoanut oil; in order to ship their cocoanut oil from San Francisco Bay to Eastern points plaintiff and El Dorado Oil Works were forced to and did acquire all of their tank cars from parties other than railroads and all of the cars so acquired by them during the period involved were acquired from defendant pursuant to the contract in question; said railroads, in general and during the period in question could not, did not, did not attempt to, and did not have to, by law or otherwise furnish or offer to furnish or have available tank cars or other facilities for shipping cocoanut oil eastward from the San Francisco Bay area (Testimony of Messrs. Ayers, Emerson and Christie);

The applicable and controlling tariff items published by the railroads show that the railroads during the period in question did not have the facilities for shipping cocoanut oil of plaintiff and other similar shippers, did not hold themselves out as having such facilities and were not required by law or otherwise to furnish or to hold themselves out as furnishing tank cars of the particular type required by plaintiff and other shippers of cocoanut oil (Plaintiff's Exhibit No. III, Stipulation of counsel and testimony of Messrs. Ayers, Emerson and Christie);

Payments by the railroads for mileage earned by defendant's tank cars leased to El Dorado Oil Works and plaintiff pursuant to the contract in question were received by defendant and credited

upon its books to plaintiff and El Dorado Oil Works; [95] the books showed that the excess of such mileage receipts over rental charges for the tank cars leased to El Dorado Oil Works pursuant to the contract in question was paid monthly by defendant to El Dorado Oil Works until July, 1934, representing excess mileage collected by defendant prior to May 31, 1934, and that thereafter such payments were not continued, but such mileage earnings representing mileage payments received by defendant after May 31, 1934, continued to be credited as received from the railroads to El Dorado Oil Works or plaintiff upon defendant's books until commencement of this suit; defendant's books also show that the credit to El Dorado Oil Works and plaintiff of all mileage earnings received by defendant was balanced monthly against debits and the difference representing the excess mileage earnings was carried forward monthly until the credit balance on defendant's books on the last day of May, 1935 showed a credit balance of \$17,759.88 (Testimony of Mr. Solenke);

Payments of excess mileage earnings collected prior to May 31, 1934 were made by defendant to El Dorado Oil Works pursuant to the contract in question, but all mileage collected thereafter was retained by defendant, and not paid to El Dorado Oil Works or plaintiff; said contract between defendant and El Dorado Oil Works and the customary dealings between the parties required payment to El Dorado Oil Works or plaintiff by defendant

of the said excess mileage earnings collected after May 31, 1934 and withheld by it. (Stipulation of counsel and testimony of Mr. Barrows, Mr. Kais and Mr. Solenke.) [96]

II.

The Court erred in failing to find and decide as requested by plaintiff during the trial and at the close of all the evidence that there was no prohibition in the so-called Elkins Act, either at the date of the execution of the contract in question, or at any time up to the date of trial, applicable to the payment of mileage earned by tank cars used as said tank cars were used by El Dorado Oil Works and plaintiff under the terms of the contract with defendant. Said action of the Court was and is against the law and there is insufficient evidence, nor is there any evidence to support or justify that action and the Court could have ruled and decided from the evidence only in favor of plaintiff as requested. Plaintiff requested said ruling and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent substantial and uncontradicted evidence, both oral and documentary, to the following effect:

A true copy of the contract in question between defendant and El Dorado Oil Works is attached to

defendant's answer; said contract was assigned by El Dorado Oil Works to the plaintiff on or about October 31st, 1934 and defendant assented thereto; the correct amount, if any, for which judgment could be rendered for plaintiff is \$18,532.78 (Stipulation of counsel);

Prior to commencement of this action El Dorado Oil Works assigned to plaintiff its claim against defendant for \$1552.16 as alleged in the complaint (Plaintiff's Exhibit 2); [97]

There was no corporate relationship between defendant and any railroad over whose lines shipments of cocoanut oil of El Dorado Oil Works and plaintiff were made, and neither El Dorado Oil Works nor plaintiff had any agreement with any railroad carrier with reference to these mileage allowances (Stipulation and admission of counsel);

There was no agreement or other dealings between defendant and the railroads with relation to defendant's tank cars involved herein other than pertaining to checking, routing and collecting mileage for said cars; there was no agreement between said parties pertaining to rebates, and all matters pertaining to handling and receiving mileage payments upon said cars was done solely in accordance with the applicable published railroad tariffs approved by the Interstate Commerce Commission (Testimony of Messrs. Smith, Kais and Solenke);

The freight upon all shipments in defendant's tank cars during the period in question was paid by the real consignees and never by plaintiff or El

Dorado Oil Works who had no dealings with any railroad with regard to freight or mileage payments (Testimony of Mr. Barrows);

Tank cars required for shipping cocoanut oil are of special construction and require special care and El Dorado Oil Works and plaintiff were never able to obtain from railroads serving the area from which cocoanut oil was shipped any tank cars of the requisite type, nor were such cars ever used during the period in question by El Dorado Oil Works or plaintiff. (Testimony by Mr. Barrows);

The railroads serving San Francisco Bay area over which plaintiff and El Dorado Oil Works made all their shipments did not possess or have available for use by plaintiff or any other shipper of cocoanut oil from said area tank cars of [98] the particular type required for such transportation; only in rare and isolated instances did these railroads have these cars available and only in such rare cases did the railroads actually furnish their own tank cars to such shippers; plaintiff and other similar shippers were unable to ship their products in railroad tank cars but they were forced to and did use their own tank cars or cars acquired by them for shipment of their cocoanut oil; in order to ship their cocoanut oil from San Francisco Bay to Eastern points plaintiff and El Dorado Oil Works were forced to and did acquire all of their tank cars from parties other than railroads and all of the cars so acquired by them during the period involved were acquired from defendant pursuant to the contract in question; said railroads, in general

and during the period in question could not, did not, did not attempt to, and did not have to; by law or otherwise furnish or offer to furnish or have available tank cars or other facilities for shipping cocoanut oil eastward from the San Francisco Bay area (Testimony of Messrs. Ayers, Emerson and Christie);

The applicable and controlling tariff items published by the railroads show that the railroads during the period in question did not have the facilities for shipping cocoanut oil of plaintiff and other similar shippers, did not hold themselves out as having such facilities and were not required by law or otherwise to furnish or to hold themselves out as furnishing tank cars of the particular type required by plaintiff and other shippers of cocoanut oil (Plaintiff's Exhibit No. III, Stipulation of counsel and testimony of Messrs. Ayers, Emerson and Christie);

Payments by the railroads for mileage earned by defendant's tank cars leased to El Dorado Oil Works and plaintiff [99] pursuant to the contract in question were received by defendant and credited upon its books to plaintiff and El Dorado Oil Works; the books showed that the excess of such mileage receipts over rental charges for the tank cars leased to El Dorado Oil Works pursuant to the contract in question was paid monthly by defendant to El Dorado Oil Works until July, 1934, representing excess mileage collected by defendant prior to May 31, 1934, and that thereafter such payments were not continued, but such mileage earnings rep-

representing mileage payments received by defendant after May 31, 1934, continued to be credited as received from the railroads to El Dorado Oil Works or plaintiffs upon defendant's books until commencement of this suit; defendant's books also show that the credit to El Dorado Oil Works and plaintiff of all mileage earnings received by defendant was balanced monthly against debits and the difference representing the excess mileage earnings was carried forward monthly until the credit balance on defendant's books on the last day of May, 1935 showed a credit balance of \$17,759.88 (Testimony of Mr. Solenke);

Payments of excess mileage earnings collected prior to May 31, 1934 were made by defendant to El Dorado Oil Works pursuant to the contract in question, but all mileage collected thereafter was retained by defendant, and not paid to El Dorado Oil Works or plaintiff; said contract between defendant and El Dorado Oil Works and the customary dealings between the parties required payment to El Dorado Oil Works or plaintiff by defendant of the said excess mileage earnings collected after May 31, 1934 and withheld by it. (Stipulation of counsel and testimony of Mr. Barrows, Mr. Kais and Mr. Solenke.) [100].

III.

The Court erred in failing to find and decide as requested by plaintiff during the trial and at the close of all the evidence that there was nothing in the railroad tariffs or any regulation of the rail-

roads, or otherwise, prohibiting payment of mileage earned by lessee of tank cars prior to August 29, 1935. Said action of the Court was and is against the law and there is insufficient evidence, nor is there any evidence to support or justify that action and the Court could have ruled and decided from the evidence only in favor of plaintiff as requested, and said proposed finding was necessary, relevant and material from issues raised by the pleadings and at the trial. Plaintiff requested said ruling and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

The applicable published railroad tariffs in effect from the date the contract herein involved was made until commencement of this suit provided for and permitted payment by railroads of mileage for tank cars of private ownership to the owner or party who had acquired the cars (Plaintiff's Exhibit No. 3 and Stipulation by Counsel thereto).

.. Payment of mileage on movements of tank cars is based and governed by published railroad tariffs approved by the Interstate Commerce Commission; and all sums derived from defendant as mileage earned are based on those tariffs. No payments by

any railroad to defendant were made with respect to the use of the leased tank cars here involved except as permitted by published tariff (Testimony of Mr. Smith). [101]

IV.

The Court erred in failing to find and decide as requested by plaintiff during the trial and at the close of all the evidence that the freight on all of the cars leased by the El Dorado Oil Works and by plaintiff from defendant under the contract of September 28, 1933 was paid in the amounts and at the times and in all respects as required by the applicable railroad tariffs. Said action of the Court was and is against the law and there is insufficient evidence, nor is there any evidence to support or justify that action and the Court could have ruled and decided from the evidence only in favor of plaintiff as requested, and said proposed finding was necessary, relevant and material from issues raised by the pleadings and at the trial. Plaintiff requested said ruling and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

All shipments in the leased tank cars in question by El Dorado Oil Works and plaintiff were made

pursuant to contracts with eastern purchasers, prices being quoted F. O. B. Berkeley, where the plant of El Dorado Oil Works is located. Neither El Dorado Oil Works nor plaintiff ever paid the freight upon shipments of their cocoanut oil in the tank cars leased from defendant under the contract in question, but the real consignee paid the freight in each case. El Dorado Oil Works and plaintiff had no dealings with the railroads relating to freight (Testimony of Mr. Barrows); [102]

The published Consolidated Freight Tariff referred to at the trial governed payment of freight on the shipments in question (Testimony of Mr. Ayers and Mr. Emerson):

El Dorado Oil Works and plaintiff had no agreement with any railroad relative to so-called rebates. (Statement of Counsel for defendant). [103]

V.

The Court erred in failing to find and decide as requested by plaintiff during the trial and at the close of all the evidence that all said freight money was paid by the consignees of the goods shipped by El Dorado Oil Works and/or plaintiff. Said action of the Court was and is against the law and there is insufficient evidence, nor is there any evidence to support or justify that action and the Court could have ruled and decided from the evidence only in favor of plaintiff as requested, and said proposed finding was necessary, relevant and material from issues raised by the pleadings and at the trial. Plaintiff requested said ruling and duly objected

said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

All shipments by El Dorado Oil Works and plaintiff made in the leased tank cars in question were made pursuant to contracts with eastern purchasers, prices being quoted F. O. B. Berkeley, where the plant of El Dorado Oil Works was located. Neither El Dorado Oil Works nor plaintiff ever paid the freight upon any shipment in tank cars leased from defendant pursuant to the contract in question, but the freight was paid by the real consignee in each case. (Testimony by Mr. Barrows)

[104]

The Court erred in failing to find and decide as requested by plaintiff during the trial and at the close of all the evidence that none of said consignees was a party to the contract between El Dorado Oil Works and defendant or party to any contract whatsoever in respect of the rental or use of said tank cars. Said action of the Court was and is against the law and there is insufficient evidence, nor is there any evidence to support or justify that action and the Court could have ruled and decided from the evidence only in favor of plaintiff as requested, and said proposed finding was necessary, relevant and material from issues raised by the

pleadings and at the trial. Plaintiff requested said ruling and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

A true copy of the contract involved, made and entered between El Dorado Oil Works and defendant only on September 28, 1933, is attached to defendant's answer as Exhibit A, which contract governs the use and rental of the tank cars involved. (Stipulation of the parties read and received at the trial.) [105]

VII.

The Court erred in failing to find and decide as requested by plaintiff during the trial and at the close of all the evidence that neither at the time that said contract between El Dorado Oil Works and defendant was made; nor at the time that said contract was to take effect, nor at any time during the period covered by plaintiff's claim herein against defendant was there any rule, regulation or order of the Interstate Commerce Commission prohibiting the making or carrying out of such contract or the payment or credit by the defendant to its lessee of mileage earned, as provided in said contract. Said action of the Court was and is against the law

and there is insufficient evidence, nor is there any evidence to support or justify that action and the Court could have ruled and decided from the evidence only in favor of plaintiff as requested, and said proposed finding was necessary, relevant and material from issues raised by the pleadings and at the trial. Plaintiff requested said ruling and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

The handling of tank cars leased under the contract in question was done under published tariffs approved by the Interstate Commerce Commission, and no other rules or regulations were applicable. There has been no change since September 28, 1933. Payment of mileage on movement of tank cars is based on published railroad tariffs approved by the Interstate Commerce Commission, and all sums derived from defendant as mileage [106] earned are based on those tariffs. No payments were made with respect to the uses of the particular tank cars by any railroad except as permitted by published tariff. (Testimony of Mr. Smith);

The applicable published railroad tariffs provided for and permitted that mileage for the use of tank

cars would be paid by the railroads to the car owner or to the party who had acquired the cars. This provision was in effect during all the period involved here. (Plaintiff's Exhibit No. III and Stipulation of counsel thereon);

A decision of the Interstate Commerce Commission relied upon by defendant did not apply to tank cars. (Stipulation and statement of counsel) [107]

The Court erred in failing to find and decide as requested by plaintiff during the trial and at the close of all the evidence that at the time the contract involved herein was made; on September 28th, 1933, and at all times since, the railroads serving the San Francisco Bay area have never held themselves out or been obligated by published tariffs or otherwise to furnish or provide tank cars of the type used or capable of being used for shipping coconut oil from shippers in the Bay area to consignees in the areas to which oil of El Dorado Oil Works and plaintiff was shipped. Said action of the Court was and is against the law and there is insufficient evidence, nor is there any evidence to support or justify that action and the Court could have ruled and decided from the evidence only in favor of plaintiff as requested, and said proposed finding was necessary, relevant and material from issues raised by the pleadings and at the trial. Plaintiff requested said ruling and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

The Western Pacific, Southern Pacific and Santa Fe railroads, serving the San Francisco Bay area never have held themselves out nor have ever been obligated by law or their tariffs or otherwise to furnish tank cars of the type required for, or capable of use by shippers, including shippers of coconut oil out of said area (Testimony of Messrs. Ayers, Emerson and Christie);

The applicable and controlling published railroad tariffs during the period in question state that railroads in [108] general were not required nor did they hold themselves out to furnish tank cars to shippers of coconut oil (Plaintiff's Exhibit No. III and Stipulation of counsel thereon) [109]

IX.

The Court erred in failing to find and decide as requested by plaintiff during the trial and at the close of all the evidence that the railroads during the period in question have been unable and have not had the equipment or facilities to meet even a small part of the tank car requirements of shippers of coconut oil from the San Francisco Bay area. Said action of the Court was and is against the law and there is insufficient evidence, nor is there any evidence to support justify that action and the

Court could have ruled and decided from the evidence only in favor of plaintiff as requested, and said proposed finding was necessary, relevant and material from issues raised by the pleadings and at the trial. Plaintiff requested said ruling and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

Tank cars required for shipping coconut oil are of special construction and require special care and El Dorado Oil Works and plaintiff were never able to obtain from railroads serving the area from which their coconut oil was shipped any tank cars of the requisite type, nor were railroad cars ever used during the period in question by El Dorado Oil Works or plaintiff (Testimony of Mr. Barrows);

The railroads serving the San Francisco Bay area over which El Dorado Oil Works and plaintiff made all their shipments did not possess or have available for use by plaintiff or any other shipper of coconut oil from said area tank cars of the particular type required for such transportation; only in rare [110] and isolated instances did these railroads have these cars available and only in such

rare cases did the railroads furnish their own tank cars to shippers; plaintiff and other similar shippers were unable to ship their coconut oil in railroad tank cars but were forced to and did use their own tank cars or cars required by them for shipment of their coconut oil; said railroads, in general and during the period involved could not and did not furnish or offer to furnish facilities for shipping coconut oil from San Francisco Bay area (testimony of Messrs. Ayers, Emerson and Christie);

The applicable and controlling published railroad tariffs during the period in question show that railroads did not have the facilities for shipping coconut oil (Plaintiff's Exhibit No. 3, Stipulation of Counsel thereon, and testimony of Messrs. Ayers, Emerson, and Christie). [111]

X.

The Court erred in failing to find and decide as requested by plaintiff during the trial and at the close of all the evidence that defendant during the period in question had no relation with the railroads serving the San Francisco Bay area as to tank cars leased under the contract involved except as to checking the movement of said tank cars and receiving mileage earnings according to published tariffs. Said action of the Court was and is against the law and there is insufficient evidence, nor is there any evidence to support or justify that action and the Court could have ruled and decided from the evidence only in favor of plaintiff as requested,

and material from issues raised by the pleadings at the trial. Plaintiff requested said ruling and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent substantial and uncontradicted evidence, both oral and documentary, to the following effect:

There was no corporate relationship between defendant and any of the railroads (Stipulation of Counsel);

There was no agreement between defendant and the Western Pacific, Southern Pacific or Santa Fe, or any railroad, for the movement of tank cars of defendant, nor for the payment of mileage. Mileage payments are made pursuant to and based upon applicable published mileage tariffs only. Defendant owned all tank cars leased under the contract involved herein. Handling of tank car movements was done solely under published tariffs approved by the Interstate Commerce Commission (Testimony of Mr. Smith). [112]

XI.

The Court erred in failing to find and decide as requested by plaintiff during the trial and at the close of all the evidence that neither the contract in

certain mileage earnings by defendant, nor the credit and payment over of such earnings was or is illegal, or in violation of or prohibited by the so-called Elkins Act or any regulation or order made thereunder. Said action of the Court was and is against the law and there is insufficient evidence, nor is there any evidence to support or justify that action and the Court could have ruled and decided from the evidence only in favor of plaintiff as requested. Plaintiff requested said ruling and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

A true copy of the contract in question between defendant and El Dorado Oil Works is attached to defendant's answer; said contract was assigned by El Dorado Oil Works to the plaintiff on or about October 31st, 1934 and defendant assented there; the correct amount, if any, for which judgment could be rendered for plaintiff is \$18,532.78 (Stipulation of counsel);

Prior to commencement of this action El Dorado Oil Works assigned to plaintiff its claim against defendant for \$1552.16 as alleged in the complaint (Plaintiff's Exhibit 2);

There was no corporate relationship between defendant and any railroad over whose lines shipments of cocoanut oil [113] of El Dorado Oil Works and plaintiff were made, and neither El Dorado Oil Works nor plaintiff had any agreement with any railroad carrier with reference to these mileage allowances (Stipulation and admission of counsel);

There was no agreement or other dealings between defendant and the railroads with relation to defendant's tank cars involved herein other than pertaining to checking, routing and collecting mileage for said cars; there was no agreement between said parties pertaining to rebates, and all matters pertaining to handling and receiving mileage payments upon said cars was done solely in accordance with the applicable published railroad tariffs approved by the Interstate Commerce Commission (Testimony of Messrs. Smith, Kais and Solenke);

The freight upon all shipments in defendant's tank cars during the period in question was paid by the real consignees and never by plaintiff or El Dorado Oil Works who had no dealings with any railroad with regard to freight or mileage payments (Testimony of Mr. Barrows);

Tank Cars required for shipping cocoanut oil are of special construction and require special care and El Dorado Oil Works and plaintiff were never able to obtain from railroads serving the area from which cocoanut oil was shipped any tank cars of the requisite type, nor were such cars ever used during the period in question by El Dorado Oil Works of plaintiff. (Testimony by Mr. Barrows);

The railroads serving San Francisco Bay area over which plaintiff and El Dorado Oil Works made all their shipments did not possess or have available for use by plaintiff or any other shipper of cocoanut oil from said area tank cars of the particular type required for such transportation; only in rare and isolated instances did these railroads have these cars available and only in such rare cases did the railroads actually [114] furnish their own tank cars to such shippers; plaintiff and other similar shippers were unable to ship their products in railroad tank cars but they were forced to and did use their own tank cars or cars acquired by them for shipment of their cocoanut oil; in order to ship their cocoanut oil from San Francisco Bay to Eastern points plaintiff and El Dorado Oil Works were forced to and did acquire all of their tank cars from parties other than railroads and all of the cars so acquired by them during the period involved were acquired from defendant pursuant to the contract in question; said railroads, in general and during the period in question could not, did not, did not attempt to, and did not have to, by law or otherwise furnish or offer to furnish or have available tank cars or other facilities for shipping cocoanut oil eastward from the San Francisco Bay area (Testimony of Messrs. Ayers, Emerson and Christie):

The applicable and controlling tariff items published by the railroads show that the railroads during the period in question did not have the facilities for shipping cocoanut oil of plaintiff and other similar shippers, did not hold themselves out as having

such facilities and were not required by law or otherwise to furnish or to hold themselves out as furnishing tank cars of the particular type required by plaintiff and other shippers of cocoanut oil (Plaintiff's Exhibit No. III, Stipulation of counsel and testimony of Messrs. Ayers, Emerson and Christie);

Payments by the railroads for mileage earned by defendant's tank cars leased to El Dorado Oil Works and plaintiff pursuant to the contract in question were received by defendant and credited upon its books to plaintiff and El Dorado Oil Works; the books showed that the excess of such mileage receipts over [115] rental charges for the tank cars leased to El Dorado Oil Works pursuant to the contract in question was paid monthly by defendant to El Dorado Oil Works until July, 1934, representing excess mileage collected by defendant prior to May 31, 1934, and that thereafter such payments were not continued, but such mileage earnings representing mileage payments received by defendant after May 31, 1934, continued to be credited as received from the railroads to El Dorado Oil Works or plaintiff upon defendant's books until commencement of this suit; defendant's books also show that the credit to El Dorado Oil Works and plaintiff of all mileage earnings received by defendant was balanced monthly against debits and the difference representing the excess mileage earnings was carried forward monthly until the credit balance on defendant's books on the last day of

May, 1935 showed a credit balance of \$17,759.88 (Testimony of Mr. Solenke);

Payments of excess mileage earnings collected prior to May 31, 1934 were made by defendant to El Dorado Oil Works pursuant to the contract in question, but all mileage collected thereafter was retained by defendant, and not paid to El Dorado Oil Works or plaintiff; said contract between defendant and El Dorado Oil Works and the customary dealings between the parties required payment to El Dorado Oil Works or plaintiff by defendant of the said excess mileage earnings collected after May 31, 1934 and withheld by it. (Stipulation of counsel and testimony of Mr. Barrows, Mr. Kais and Mr. Solenke). [116]

XII.

The Court erred in failing to order decision and judgment against defendant and in favor of plaintiff as requested by plaintiff at the close of all the evidence and during the trial. Said action of the Court was and is against the law and there is insufficient evidence, nor is there any evidence to support or justify that action and the Court could have ruled and decided from the evidence only in favor of plaintiff as requested. Plaintiff requested said ruling and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all pleadings and records in this

cause and upon all the evidence offered and received at the trial thereof, and especially upon competent substantial and uncontradicted evidence, both oral and documentary, to the following effect:

A true copy of the contract in question between defendant and El Dorado Oil Works is attached to defendant's answer; said contract was assigned by El Dorado Oil Works to the plaintiff on or about October 31st, 1934, and defendant assented thereto; the correct amount, if any, for which judgment could be rendered for plaintiff is \$18,532.78 (Stipulation of counsel).

Prior to commencement of this action El Dorado Oil Works assigned to plaintiff its claim against defendant for \$1,552.16 as alleged in the complaint (Plaintiff's Exhibit 2);


There was no corporate relationship between defendant and any railroad over whose lines shipments of coconut oil of El Dorado Oil Works and plaintiff were made, and neither El Dorado Oil Works nor plaintiff had any agreement with any railroad carrier with reference to these mileage allowances (Stipulation and admission of counsel);

[117]

There was no agreement or other dealings between defendant and the railroads with relation to defendant's tank cars involved herein other than pertaining to checking, routing and collecting mileage for said cars; there was no agreement between said parties pertaining to rebates, and all matters pertaining to handling and receiving mileage pay-

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ments upon said cars was done solely in accordance with the applicable published railroad tariffs approved by the Interstate Commerce Commission, (Testimony of Messrs. Smith, Kais and Solenke);

The freight upon all shipments in defendant's tank cars during the period in question was paid by the real consignees and never by plaintiff or El Dorado Oil Works who had no dealings with any railroad with regard to freight or mileage payments (Testimony of Mr. Barrows);

Tank cars required for shipping coconut oil are of special construction and require special care and El Dorado Oil Works and plaintiff were never able to obtain from railroads serving the area from which coconut oil was shipped any tank cars of the requisite type, nor were such cars ever used during the period in question by El Dorado Oil Works or plaintiff. (Testimony by Mr. Barrows);

The railroads serving San Francisco Bay area over which plaintiff and El Dorado Oil Works made all their shipments did not possess or have available for use by plaintiff or any other shipper of coconut oil from said area tank cars of the particular type required for such transportation; only in rare and isolated instances did these railroads have these cars available and only in such rare cases did the railroads actually furnish their own tank cars to such shippers; plaintiff and other similar shippers were unable to ship their products in railroad tank cars but they were forced to and did use their own tank cars or cars acquired [118] by them for ship-

ment of their coconut oil; in order to ship their coconut oil from San Francisco Bay to Eastern points plaintiff and El Dorado Oil Works were forced to and did acquire all of their tank cars from parties other than railroads and all of the cars so acquired by them during the period involved were acquired from defendant pursuant to the contract in question; said railroads, in general and during the period in question could not, did not, did not attempt to, and did not have to, by law or otherwise, furnish or offer to furnish or have available tank cars or other facilities for shipping coconut oil eastward from the San Francisco Bay area (Testimony of Messrs. Ayers, Emerson and Christie);

The applicable and controlling tariff items published by the railroads show that the railroads during the period in question did not have the facilities for shipping coconut oil of plaintiff and other similar shippers, did not hold themselves out as having such facilities and were not required by law or otherwise to furnish or to hold themselves out as furnishing tank cars of the particular type required by plaintiff and other shippers of coconut oil (Plaintiff's Exhibit No. III, Stipulation of counsel and testimony of Messrs. Ayers, Emerson and Christie);

Payments by the railroads for mileage earned by defendant's tank cars leased to El Dorado Oil Works and plaintiff pursuant to the contract in question were received by defendant and credited upon its books to plaintiff and El Dorado Oil Works; the books showed that the excess of such

mileage receipts over rental charges for the tank cars leased to El Dorado Oil Works pursuant to the contract in question was paid monthly by defendant to El Dorado Oil Works until July, 1934, representing excess mileage collected by defendant prior to May 31, 1934, and that thereafter such payments were not continued, but such mileage [119] earnings representing mileage payments received by defendant after May 31, 1934, continued to be credited as received from the railroads to El Dorado Oil Works or plaintiff upon defendant's books until commencement of this suit; defendant's books also show that the credit to El Dorado Oil Works and plaintiff of all mileage earnings received by defendant was balanced monthly against debits and the difference representing the excess mileage earnings was carried forward monthly until the credit balance on defendant's books on the last day of May, 1935 showed a credit balance of \$17,759.88 (Testimony of Mr. Solenke);

Payments of excess mileage earnings collected prior to May 31, 1934, were made by defendant to El Dorado Oil Works pursuant to the contract in question, but all mileage collected thereafter was retained by defendant, and not paid to El Dorado Oil Works or plaintiff; said contract between defendant and El Dorado Oil Works and the customary dealings between the parties required payment to El Dorado Oil Works or plaintiff by defendant of the said excess mileage earnings collected after May 31, 1934 and withheld by it. (Stipu-

lation of counsel and testimony of Mr. Barrows, Mr. Kais and Mr. Sölenke). [120]

XIII.

The Court erred in ordering decision and judgment against plaintiff and in favor of defendant, contrary to motion and request by plaintiff at the trial for decision and judgment in its favor. Said action of the Court was and is against the law and there is insufficient evidence, nor is there any evidence to support or justify the order, decision and judgment of the Court and the Court could have acted and decided from the evidence only in favor of plaintiff and against defendant, as requested. Plaintiff objected and duly excepted to said action on each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

A true copy of the contract in question between defendant and El Dorado Oil Works is attached to defendant's answer; said contract was assigned by El Dorado Oil Works to the plaintiff on or about October 31st, 1934 and defendant assented thereto; the correct amount, if any, for which judgment could be rendered for plaintiff is \$18,532.78 (Stipulation of counsel);

Prior to commencement of this action El Dorado Oil Works assigned to plaintiff its claim against defendant for \$1552.16 as alleged in the complaint (Plaintiff's Exhibit 2).;

There was no corporate relationship between defendant and any railroad over whose lines shipments of cocoanut oil of El Dorado Oil Works and plaintiff were made, and neither El Dorado Oil Works nor plaintiff had any agreement with any [121] railroad carrier with reference to these mileage allowances (Stipulation and admission of counsel).;

There was no agreement or other dealings between defendant and the railroads with relation to defendant's tank cars involved herein other than pertaining to checking, routing and collecting mileage for said cars; there was no agreement between said parties pertaining to rebates, and all matters pertaining to handling and receiving mileage payments upon said cars was done solely in accordance with the applicable published railroad tariffs approved by the Interstate Commerce Commission (Testimony of Messrs. Smith, Kais and Solenke).;

The freight upon all shipments in defendant's tank cars during the period in question was paid by the real consignees and never by plaintiff or El Dorado Oil Works who had no dealings with any railroad with regard to freight or mileage payments (Testimony of Mr. Barrows).;

Tank cars required for shipping cocoanut oil are of special construction and require special care and El Dorado Oil Works and plaintiff were never able

to obtain from railroads serving the area from which cocoanut oil was shipped any tank cars of the requisite type, nor were such railroad cars ever used during the period in question by El Dorado Oil Works or plaintiff. (Testimony by Mr. Barrows);

The railroads serving San Francisco Bay area over which plaintiff and El Dorado Oil Works made all their shipments did not possess or have available for use by plaintiff or any other shipper of cocoanut oil from said area tank cars of the particular type required for such transportation; only in rare and isolated instances did these railroads have these cars available and only in such rare cases did the railroads actually furnish their own tank cars to such shippers; plaintiff and [122] other similar shippers were unable to ship their products in railroad tank cars but they were forced to and did use their own tank cars or cars acquired by them for shipment of their cocoanut oil; in order to ship their cocoanut oil from San Francisco Bay to Eastern points plaintiff and El Dorado Oil Works were forced to and did acquire all of their tank cars from parties other than railroads and all of the cars so acquired by them during the period involved were acquired from defendant pursuant to the contract in question; said railroads, in general and during the period in question could not, did not, did not attempt to, and did not have to, by law or otherwise, furnish or offer to furnish or have available tank cars or other facilities for shipping cocoanut oil eastward from the San Francisco Bay

area (Testimony of Messrs. Ayers, Emerson and Christie);

The applicable and controlling tariff items published by the railroads show that the railroads during the period in question did not have the facilities for shipping cocoanut oil of plaintiff and other similar shippers, did not hold themselves out as having such facilities and were not required by law or otherwise to furnish or to hold themselves out as furnishing tank cars of the particular type required by plaintiff and other shippers of cocoanut oil (Plaintiff's Exhibit No. III, Stipulation of counsel and testimony of Messrs. Ayers, Emerson and Christie);

Payments by the railroads for mileage earned by defendant's tank cars leased to El Dorado Oil Works and plaintiff pursuant to the contract in question were received by defendant and credited upon its books to plaintiff and El Dorado Oil Works; the books showed that the excess of such mileage receipts over rental charges for the tank cars leased to El Dorado Oil Works [123] pursuant to the contract in question was paid monthly by defendant to El Dorado Oil Works until July, 1934, representing excess mileage collected by defendant prior to May 31, 1934, and that thereafter such payments were not continued, but such mileage earnings representing mileage payments received by defendant after May 31, 1934, continue to be credited as received from the railroads to El Dorado Oil Works or plaintiff upon defendant's books until commencement of this suit; defendant's books also show that the credit to El Dorado Oil Works and

plaintiff of all mileage earnings received by defendant was balanced monthly against debits and the difference representing the excess mileage earnings was carried forward monthly until the credit balance on defendant's books on the last day of May, 1935 showed a credit balance of \$17,759.88 (Testimony of Mr. Solenke);

Payments of excess mileage earnings collected prior to May 31, 1934 were made by defendant to El Dorado Oil Works pursuant to the contract in question, but all mileage collected thereafter was retained by defendant, and not paid to El Dorado Oil Works or plaintiff; said contract between defendant and El Dorado Oil Works and the customary dealings between the parties required payment to El Dorado Oil Works or plaintiff by defendant of the said excess mileage earnings collected after May 31, 1934 and withheld by it. (Stipulation of counsel and testimony of Mr. Barrows, Mr. Kais and Mr. Solenke). [124]

XIV.

The Court erred in failing to make or sign the following proposed additional Finding:

"At the date of said contract between El Dorado Oil Works and defendant, and at all times thereafter, there were in effect published tariffs, approved by the Interstate Commerce Commission, applicable to the movement of said tank cars loaded with coconut oil. In and as a part of said tariffs it was provided that the carrier would pay to the owner, lessee or user

of said tank cars a mileage allowance of $11\frac{1}{2}$ ¢ per mile travelled by said cars, each of the cars paying according to the mileage travelled on its tracks. The term "mileage earned", as used in said contract, was intended by the parties thereto to refer to the said allowance as so provided for in said tariffs. No other allowance for the movement was made or paid by any of the carriers over whose lines said tank cars moved."

Said proposed additional Finding was duly requested by plaintiff after the decision of the Court in favor of defendant and ordering judgment in favor of defendant on special findings. Plaintiff offered and requested said additional Finding pursuant to Rule 42 of the above-entitled Court, said rule then being in effect. Said action of the Court was and is against the law, and there is insufficient evidence, nor is there any evidence to support or justify said action, and the court could have acted only in favor of plaintiff, as requested, and said proposed additional Finding was necessary, relevant and material from issues raised by the pleadings and at the trial, and was not covered by any Finding of Fact made by the Court. Plaintiff requested said Finding and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all the pleadings and records in this cause and upon all the evidence offered and received

at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

The published mileage tariffs of the railroads were in effect at all times during the period of the contract herein involved. These tariffs provided for payments by railroads for use [125] of tank cars of private ownership to the owner or party who had acquired the cars (Plaintiff's Exhibit No. III and Stipulation of Counsel thereto).

Tank cars leased from defendant under the contract in question were handled under published tariffs approved by the Interstate Commerce Commission, and no other rules or regulations were applicable. There has been no change since September 28, 1933. Payment of mileage on movement of tank cars is based on published tariffs approved by Interstate Commerce Commission, and all sums derived from defendant as mileage earned are based on those tariffs. No payments were made with respect to the use of the tank cars leased by defendant and herein involved except as permitted by said tariffs (Testimony of Mr. Smith). [126]

XV.

The court erred in failing to make or sign the following proposed additional Finding:

"There was paid to the common carriers over whose lines said tank cars moved for the transportation of said coconut oil in all said cars leased from defendant under said agreement of September, 1933, the exact rates provided in

and in all respects as required by said published and filed tariffs applicable to such transportation."

Said proposed additional Finding was duly requested by plaintiff after the decision of the court in favor of defendant and ordering judgment in favor of defendant on special findings. Plaintiff offered and requested said additional Finding pursuant to Rule 42 of the above entitled court, said rule then being in effect. Said action of the court was and is against the law, and there is insufficient evidence, nor is there any evidence to support or justify said action, and the court could have acted only in favor of plaintiff as requested, and said proposed additional Finding was necessary, relevant and material from issues raised by the pleadings and at the trial, and was not covered by any Finding of Fact made by the court. Plaintiff requested said Finding and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all the pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

All shipments in the leased tank cars in question by El Dorado Oil Works and plaintiff were made

pursuant to contracts with eastern purchasers, prices being quoted F. O. B. Berkeley, where the plant of El Dorado Oil Works is located. [127] Neither El Dorado Oil Works nor plaintiff ever paid the freight upon shipments of their coconut oil in the tank cars leased from defendant under the contract in question, but the real consignee paid the freight in each case. El Dorado Oil Works and plaintiff had no dealings with the railroads relating to freight (Testimony of Mr. Barrows).

The published Consolidated Freight Tariff referred to at the trial governed payment of freight on the shipments in question. (Testimony of Mr. Ayers and Mr. Emerson):

El Dorado Oil Works and plaintiff had no agreement with any railroad relative to so-called rebates. (Statement of Counsel for defendant). [128]

XVI.

The Court erred in failing to make or sign the following proposed additional Finding:

"All said freight money was paid by the consignee or notified parties of the goods shipped by El Dorado Oil Works and/or El Dorado Terminal Company, and none of said consignees or notified parties was a party to the said contract between the El Dorado Oil Works and General American Tank Car Corporation or party to any contract whatsoever in respect of the rental or use of said tank cars."

Said proposed additional Finding was duly requested by plaintiff after the decision of the Court

in favor of defendant and ordering judgment in favor of defendant on special findings. Plaintiff offered and requested said additional Finding pursuant to Rule 42 of the above entitled Court, said rule then being in effect. Said action of the Court was and is against the law, and there is insufficient evidence, nor is there any evidence to support or justify said action, and the court could have acted only in favor of plaintiff, as requested, as said proposed additional Finding was necessary, relevant and material from issues raised by the pleadings and at the trial, and was not covered by any Finding of Fact made by the Court. Plaintiff requested said Finding and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all the pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

All shipments by El Dorado Oil Works and plaintiff made in the leased tank cars in question were made pursuant to contracts with eastern purchasers, prices being quoted F. O. B. Berkeley, where the plant of El Dorado Oil Works was located. [129] Neither El Dorado Oil Works nor plaintiff ever paid the freight upon any shipment in tank cars leased from defendant pursuant to the contract in question, but the freight was paid by the real con-

signee in each case (Testimony of Mr. Barrows).

A true copy of the contract involved, made and entered between El Dorado Oil Works and defendant only on September 28, 1933, is attached to defendant's answer as Exhibit A, which contract governs the use and rental of the tank cars involved. (Stipulation of the parties read and received at the trial). [130]

XVII.

The Court erred in failing to make or sign the following proposed additional Finding:

"Neither at the time that said contract between the El Dorado Oil Works and General American Tank Car Corporation was made, nor at the time that the said contract was to take effect, to-wit, January 1, 1934, nor at any time during the period covered by plaintiff's claims against the General American Tank Car Corporation was there any rule, regulation or order of the Interstate Commerce Commission prohibiting the making or carrying out of said contract or the payment or credit by the General American Tank Car Corporation to El Dorado Oil Works and/or plaintiff, its lessee, of any or all mileage earned in respect to the tank cars covered by said contract and as therein provided."

Said proposed additional Finding was duly requested by plaintiff after the decision of the court in favor of defendant and ordering judgment in favor of defendant on special findings. Plaintiff

offered and requested said additional Finding pursuant to Rule 42 of the above-entitled Court, said rule then being in effect. Said action of the Court was and is against the law, and there is insufficient evidence, nor is there any evidence to support or justify said action, and the court could have acted only in favor of plaintiff, as requested, and said proposed additional Finding was necessary, relevant and material from issues raised by the pleadings and at the trial, and was not covered by any Finding of Fact made by the Court. Plaintiff requested said Finding and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all the pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence both oral and documentary, to the following effect:

The handling of tank cars leased under the contract in question was done under published tariffs approved by the Interstate Commerce Commission, and no other rules or regulations [131] were applicable. There has been no change since September 28, 1933. Payment of mileage on movement of tank cars is based on published railroad tariffs approved by the Interstate Commerce Commission, and all sums derived from defendant as mileage earned are based on those tariffs. No payments were made

with respect to the use of the particular tank cars by any railroad except as permitted by published tariff. (Testimony of Mr. Smith);

The applicable published railroad tariffs provided for and permitted that mileage for the use of tank cars would be paid by the railroads to the car owner or to the party who had acquired the cars. This provision was in effect during all the period involved here. (Plaintiff's Exhibit No. III and Stipulation of counsel thereon);

A decision of the Interstate Commerce Commission relied upon by defendant did not apply to tank cars. (Stipulation and statement of counsel) [132]

XVIII.

The Court erred in failing to make or sign the following proposed additional Finding:

"The said published tariffs in effect at the time of said agreement between El Dorado Oil Works and defendant was executed and continuously thereafter authorized and provided for payment to the owner or the lessee or user of tank cars used by shippers of coconut oil, at the rate of $1\frac{1}{2}$ ¢ per mile travelled by said cars over the lines of railroad carriers."

Said proposed additional Finding was duly requested by plaintiff after the decision of the Court in favor of defendant and ordering judgment in favor of defendant on special findings. Plaintiff offered and requested said additional Finding pursuant to Rule 42 of the above-entitled Court, said

rule then being in effect. Said action of the Court was and is against the law, and there is insufficient evidence, nor is there any evidence to support or justify said action, and the court could have acted only in favor of plaintiff, as requested, and said proposed additional Finding was necessary, relevant and material from issues raised by the pleadings and at the trial, and was not covered by any Finding of Fact made by the Court. Plaintiff requested said Finding and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all the pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

The published mileage tariffs of the railroads were in effect at all times during the period of the contract herein involved. These tariffs provided for payments by railroads for use of tank cars of private ownership to the owner or party who [133] had acquired the cars (Plaintiff's Exhibit No. III and Stipulation of Counsel thereto).

Tank cars leased from defendant under the contract in question were handled under published tariffs approved by the Interstate Commerce Commission, and no other rules or regulations were applicable. There has been no change since September

28, 1933. Payment of mileage on movement of tank cars is based on published tariffs approved by Interstate Commerce Commission, and all sums derived from defendant as mileage earned are based on those tariffs. No payments were made with respect to the use of the tank cars leased by defendant and herein involved except as permitted by said tariffs (Testimony of Mr. Smith). [134]

XIX.

The Court erred in failing to make, or sign the following proposed additional Finding:

“At the time the contract involved herein was made, on September 28, 1933, and at all times since, none of the railroads serving the San Francisco Bay Area in which plaintiff and El Dorado Oil Works are located, has held itself out or been obligated or required by statute, published tariffs or otherwise to furnish or provide tank cars of the type used or capable of being used for shipping coconut oil from shippers in the bay area to consignees in the areas to which coconut oil manufactured by El Dorado Oil Works was shipped.”

Said proposed additional Finding was duly requested by plaintiff after the decision of the Court in favor of defendant and ordering judgment in favor of defendant on special findings. Plaintiff offered and requested said additional Finding pursuant to Rule 42 of the above-entitled Court, said rule then being in effect. Said action of the Court

was and is against the law, and there is insufficient evidence, nor is there any evidence to support or justify said action, and the court could have acted only in favor of plaintiff, as requested, and said proposed additional Finding was necessary, relevant and material from issues raised by the pleadings and at the trial, and was not covered by any Finding of Fact made by the Court. Plaintiff requested said Finding and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all the pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

The Western Pacific, Southern Pacific and Santa Fe railroads, serving the San Francisco Bay area never have held themselves out, nor have ever been obligated by law or their [135] tariffs or otherwise to furnish tank cars of the type required for, or capable of use by shippers, including shippers of coconut oil out of said area (Testimony of Messrs. Ayers, Emerson and Christie);

The applicable and controlling published railroad tariffs during the period in question state that railroads in general were not required nor did they hold themselves out to furnish tank cars to shippers of coconut oil (Plaintiff's Exhibit No. III and Stipulation of counsel thereon) [136]

XX.

The Court erred in failing to make or sign the following proposed additional Finding:

"All of said railroads serving the San Francisco Bay area at all times during the period from and after September 28, 1933, have been unable and have not had the equipment or facilities to meet the smallest part, to-wit, less than one percent of the tank car requirements of shippers of coconut oil from said bay area, or to provide, except in rare and isolated instances, to said shippers tank cars capable of transporting coconut oil."

Said proposed additional Finding was duly requested by plaintiff after the decision of the Court in favor of defendant and ordering judgment in favor of defendant on special findings. Plaintiff offered and requested said additional Finding pursuant to Rule 42 of the above-entitled Court, said rule then being in effect. Said action of the Court was and is against the law, and there is insufficient evidence, nor is there any evidence to support or justify said action, and the court could have acted only in favor of plaintiff, as requested, and said proposed additional Finding was necessary, relevant and material from issues raised by the pleadings and at the trial, and was not covered by any Finding of Fact made by the Court. Plaintiff requested said Finding and duly objected and excepted to said action upon each and all of the said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all the pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

Tank cars required for shipping coconut oil are of special construction and require special care and El Dorado Oil Works and plaintiff were never able to obtain from railroads serving the area from which their coconut oil was shipped any [137] tank cars of the requisite type, nor were railroad cars ever used during the period in question by El Dorado Oil Works or plaintiff (Testimony of Mr. Barrows):

The railroads serving the San Francisco Bay area over which El Dorado Oil Works and plaintiff made all their shipments did not possess or have available for use by plaintiff or any other shipper of coconut oil from said area tank cars of the particular type required for such transportation, only in rare and isolated instances did these railroads have these cars available and only in such rare cases did the railroads furnish their own tank cars to shippers; plaintiff and other similar shippers were unable to ship their coconut oil in railroad tank cars but were forced to and did use their own tank cars or cars required by them for shipment of their coconut oil; said railroads, in general and during the period involved could not and did not furnish or offer to furnish facilities for ship-

ping coconut oil from San Francisco Bay area (Testimony of Messrs. Ayers, Emerson and Christie);

The applicable and controlling published railroad tariffs during the period in question show that railroads did not have the facilities for shipping coconut oil (Plaintiff's Exhibit No. 3, Stipulation of Counsel thereon, and testimony of Messrs. Ayers, Emerson and Christie). [138]

XXI.

The Court erred in failing to make or sign the following proposed additional Finding:

"At all times during the aforementioned period General American Tank Car Corporation had no relation, corporate or otherwise, with any of the railroads over which were transported tank cars leased under said contract, or any relation with any of said railroads as to said tank cars except as to checking the movements of said tank cars and receiving from said railroads mileage allowances earned in respect to said cars according to the published tariffs, or any relation with consignees or parties to whom said coconut oil was ultimately destined, or any relation with plaintiff or El Dorado Oil Works except as resulted from the aforementioned contract."

Said proposed additional Finding was duly requested by plaintiff after the decision of the Court in favor of defendant and ordering judgment in favor of defendant on special findings. Plaintiff offered and requested said additional Finding pur-

suant to Rule 42 of the above-entitled Court, said rule then being in effect. Said action of the Court was and is against the law, and there is insufficient evidence, nor is there any evidence to support or justify said action, and the court could have acted only in favor of plaintiff, as requested, and said proposed additional Finding was necessary, relevant and material from issues raised by the pleadings and at the trial, and was not covered by any Finding of Fact made by the Court. Plaintiff requested said Finding and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all the pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

There was no corporate relationship between defendant and any of the railroads (Stipulation of Counsel):

There was no agreement between defendant and the [139] Western Pacific, Southern Pacific or Santa Fe, or any railroad, for the movement of tank cars of defendant, nor for the payment of mileage. Mileage payments are made pursuant to and based upon applicable published mileage tariffs only, and were made by the railroads to defendant. Defendant owned all tank cars leased under the contract involved herein. Handling of tank car movements was

done solely under published tariffs approved by the Interstate Commerce Commission (Testimony of Mr. Smith). Defendant's dealings with El Dorado Oil Works and plaintiff resulted solely from the contract herein (Testimony of Mr. Smith). The actual consignee and never El Dorado Oil Works or plaintiff paid the freight upon coconut oil shipped in tank cars leased from defendant under the contract in question. El Dorado Oil Works and plaintiff never dealt in any way with the railroads in reference to freight bills. Coconut oil was shipped to consignees under contract with prices F. O. B. Berkeley (Testimony by Mr. Barrows).

Defendant settled monthly with El Dorado Oil Works or plaintiff in regard to service charges for tank cars leased under the contract in question and mileage payments received by defendant from the railroads. (Testimony of Mr. Solenke) [140]

XXII.

The Court erred in failing to make or sign the following proposed additional Finding:

"All the aforementioned mileage received by defendant was the exact amount provided in said published tariffs for mileage earned by said tank cars leased to El Dorado Oil Works and plaintiff under said contract."

Said proposed additional Finding was duly requested by plaintiff after the decision of the Court in favor of defendant and ordering judgment in favor of defendant on special findings. Plaintiff offered and requested said additional Finding pur-

suant to Rule 42 of the above-entitled Court, said rule then being in effect. Said action of the Court was and is against the law, and there is insufficient evidence, nor is there any evidence to support or justify said action, and the court could have acted only in favor of plaintiff, as requested, and said proposed additional Finding was necessary, relevant and material from issues raised by the pleadings and at the trial, and was not covered by any Finding of Fact made by the Court. Plaintiff requested said Finding and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all the pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

Payment of mileage on movements of tank cars is based and governed by published railroad tariffs, approved by the Interstate Commerce Commission; and all sums derived from defendant as mileage earned are based on those tariffs. No payments by any railroad to defendant were made with respect to [141] the use of the leased tank cars here involved except as permitted by published tariff (Testimony of Mr. Smith). [142]

XXIII.

The Court erred in making and signing its Conclusion of Law No. I, which the Court made from the Findings of Fact made by it pursuant to its order, as follows:

“That defendant was and is prohibited and enjoined by law, and particularly by the provisions of that certain statute of the United States of America entitled ‘An Act to further regulate commerce with foreign nations and among the states’ (32 Stat. L. 847; 34 Stat. L. 584; U. S. Code Annotated, Title 49 Sec. 41), commonly known as the Elkins Act, from crediting or paying to either plaintiff or El Dorado Oil Works any mileage earnings received from said common carriers in excess of said car hire or rental reserved in said agreement.”

Said Conclusion of Law was and is against the law, and was and is not supported or justified by Findings of Fact of the Court, or any of them, or by said Findings and any implied Finding of Fact of the Court, and the Court could have concluded from its Findings of Fact only in favor of plaintiff. Plaintiff objected and duly excepted to said Conclusion of Law upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor, are based upon all pleadings and records in this

cause, all the Findings of Fact of the Court, and upon the law applicable hereto including the so-called Elkins Act, (codified as modified in T49USCA Ch. 2) and Interstate Commerce Act (T49USCA Ch. 1) [143]

XXIV.

The Court erred in making and signing its Conclusion of Law No. II, which the Court made from the Findings of Fact made by it pursuant to its order, as follows:

"That, if defendant were to credit or to pay over to plaintiff or to said El Dorado Oil Works any part of the mileage payments received from said common carriers by defendant, as the owner of said tank cars, in excess of the car hire or rental reserved in said agreement, such credit or payment would be unlawful in that plaintiff or said El Dorado Oil Works would secure the transportation of property at rates less than the rates named in the published and filed tariffs of said common carriers applicable to such transportation, thereby obtaining a rebate or concession and an advantage or discrimination, in violation of the provisions of said Elkins Act."

Said Conclusion of Law was and is against the law, and was and is not supported or justified by Findings of Fact of the Court, or any of them, or by said Findings and any implied Finding of Fact of the

Court, and the Court could have concluded from its Findings of Fact only in favor of plaintiff. Plaintiff objected and duly excepted to said Conclusion of Law upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor, are based upon all pleadings and records in this cause, all the Findings of Fact of the Court, and upon the law applicable hereto including the so-called Elkins Act, (codified as modified in T49USCA Ch. 2) and Interstate Commerce Act (T49USCA Ch. 1). [144]

XXV.

The Court erred in making and signing its Conclusion of Law No. III, which the Court made from the Findings of Fact made by it pursuant to its order, as follows:

"That plaintiff was lawfully entitled to receive and defendant was lawfully required to pay over to plaintiff under the terms and provisions of said agreement only such car mileage earnings as were not in excess of the car hire or rental reserved in said agreement."

Said Conclusion of Law was and is against the law, and was and is not supported or justified by Findings of Fact of the Court, or any of them, or by said Findings and any implied Finding of Fact of the Court, and the Court could have concluded from its Findings of Fact only in favor of plaintiff.

Plaintiff objected and duly excepted to said Conclusion of Law upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor, are based upon all pleadings and records in this cause, all the Findings and Fact of the Court, and upon the law applicable hereto including the so-called Elkins Act, (codified as modified in T49USCA Ch. 2) and Interstate Commerce Act (T49USCA Ch. 1). [145]

XXVI.

The Court erred in making and signing its Conclusion of Law No. IV, which the Court made from the Findings of Fact made by it pursuant to its order, as follows:

“That defendant is entitled to judgment herein and to recover against plaintiff its costs herein incurred.”

Said Conclusion of Law was and is against the law, and was and is not supported or justified by Findings of Fact of the Court, or any of them, or by said Findings and any implied Finding of Fact of the Court, and the Court could have concluded from its Findings of Fact only in favor of plaintiff. Plaintiff objected and duly excepted to said Conclusion of Law upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor, are based upon all pleadings and records in this cause, all the Findings of Fact of the Court, and upon the law applicable hereto including the so-called Elkins Act, (codified as modified in T49USCA Ch. 2) and Interstate Commerce Act (T49USCA Ch. 1). [146]

XXVII.

The Court erred in making and entering, by the Clerk thereof, its judgment against plaintiff and in favor of defendant, contrary to motion and request by plaintiff during the trial and at the close of all the evidence for judgment in favor of plaintiff. Said action and judgment were and are against the law, and there is insufficient evidence, nor is there any evidence or Finding or Findings of Fact to support or justify said action and judgment, and the court could have acted from the evidence and from its Findings of Fact only in favor of plaintiff as requested. Plaintiff requested judgment and duly objected and excepted to said action upon each and all of said grounds, and specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all pleadings, records and findings of fact in this cause, and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

A true copy of the contract in question between defendant and El Dorado Oil Works is attached to defendant's answer; said contract was assigned by El Dorado Oil Works to the plaintiff on or about October 31, 1934 and the defendant assented thereto; the correct amount, if any, for which judgment could be rendered for plaintiff is \$18,532.78 (Stipulation of counsel);

Prior to commencement of this action El Dorado Oil Works assigned to plaintiff its claim against defendant for \$1552.16 as alleged in the complaint (Plaintiff's Exhibit 2);

There was no corporate relationship between defendant and any railroad over whose lines shipments of coconut oil of El Dorado Oil Works and plaintiff were made, and neither El [147] Dorado Oil Works nor plaintiff had any agreement with any railroad carrier with reference to these mileage allowances (Stipulation and admission of counsel).

There was no agreement or other dealings between defendant and the railroads with relation to defendant's tank cars involved herein other than pertaining to checking, routing and collecting mileage for said cars; there was no agreement between said parties pertaining to rebates, and all matters pertaining to handling and receiving mileage payments upon said cars was done solely in accordance with the applicable published railroad tariffs approved by the Interstate Commerce Commission (Testimony of Messrs. Smith, Kais and Solenke);

The freight upon all shipments in defendant's tank cars during the period in question was paid by the real consignees and never by plaintiff or El Dorado Oil Works who had no dealings with any railroad with regard to freight or mileage payments (Testimony of Mr. Barrows);

Tank cars required for shipping coconut oil are of special construction and require special care and El Dorado Oil Works and plaintiff were never able to obtain from railroads serving the area from which coconut oil was shipped any tank cars of the requisite type, nor were such cars ever used during the period in question by El Dorado Oil Works or plaintiff. (Testimony by Mr. Barrows);

The railroads serving San Francisco Bay area over which plaintiff and El Dorado Oil Works made all their shipments did not possess or have available for use by plaintiff or any other shipper of coconut oil from said area tank cars of the particular type required for such transportation; only in rare and isolated instances did these railroads have these cars available and only in such rare cases did the railroads actually [148] furnish their own tank cars to such shippers; plaintiff and other similar shippers were unable to ship their products in railroad tank cars but they were forced to and did use their own tank cars or cars acquired by them for shipment of their coconut oil; in order to ship their coconut oil from San Francisco Bay to Eastern points plaintiff and El Dorado Oil Works were forced to and did acquire all of their tank cars from parties other than railroads and all

of the cars so acquired by them during the period involved were acquired from defendant pursuant to the contract in question; said railroads, in general and during the period in question could not, did not, did not attempt to, and did not have to, by law or otherwise, furnish or offer to furnish or have available tank cars or other facilities for shipping coconut oil eastward from the San Francisco Bay area (Testimony of Messrs. Ayers, Emerson and Christie);

"The applicable and controlling tariff items published by the railroads show that the railroads during the period in question did not have the facilities for shipping coconut oil of plaintiff and other similar shippers, did not hold themselves out as having such facilities and were not required by law or otherwise to furnish or to hold themselves out as furnishing tank cars of the particular type required by plaintiff and other shippers of coconut oil (Plaintiff's Exhibit No. III, Stipulation of counsel and testimony of Messrs. Ayers, Emerson and Christie);

Payments by the railroads for mileage earned by defendant's tank cars leased to El Dorado Oil Works and plaintiff pursuant to the contract in question were received by defendant and credited upon its books to plaintiff and El Dorado Oil Works; the books showed that the excess of such mileage receipts over rental charges for the tank cars leased to El Dorado Oil Works pursuant to the contract in question was paid monthly by [149] defendant to El Dorado Oil Works until July, 1934.

representing excess mileage collected by defendant prior to May 31, 1934, and that thereafter such payments were not continued, but such mileage earnings representing mileage payments received by defendant after May 31, 1934, continued to be credited as received from the railroads to El Dorado Oil Works or plaintiff upon defendant's books until commencement of this suit; defendant's books also show that the credit to El Dorado Oil Works and plaintiff of all mileage earnings received by defendant was balanced monthly against debits and the difference representing the excess mileage earnings was carried forward monthly until the credit balance on defendant's books on the last day of May, 1935 showed a credit balance of \$17,759.88 (Testimony of Mr. Solenke);

Payments of excess mileage earnings collected prior to May 31, 1934, were made by defendant to El Dorado Oil Works pursuant to the contract in question, but all mileage collected thereafter was retained by defendant, and not paid to El Dorado Oil Works or plaintiff; said contract between defendant and El Dorado Oil Works and the customary dealings between the parties required payment to El Dorado Oil Works or plaintiff by defendant of the said excess mileage earnings collected after May 31, 1934, and withheld by it. (Stipulation of counsel and testimony of Mr. Barrows, Mr. Kais and Mr. Solenke). [150]

Wherefore, plaintiff, upon the foregoing Assignment of Errors and upon the record in the above entitled cause, prays that the said judgment made

and entered therein on the 2nd day of September, 1937, be reversed, and for such other and further relief as to the court may seem just and proper.

Dated: San Francisco, California, November 26, 1937.

WILLIAMSON & WALLACE

Attorneys for plaintiff and
appellant.

Receipt of a copy of the within Assignment of Errors admitted this 26th day of November, 1937.

**McCUTCHEN, OLNEY,
MANNON & GREENE.**

[Endorsed]: Filed Nov. 26, 1937. [151]

[Title of District Court and Cause.]

**ORDER ALLOWING APPEAL AND FIXING
AND APPROVING BOND**

Plaintiff, El Dorado Terminal Company, a corporation, having duly tendered its costs bond as hereinafter more fully appears, and having duly filed and presented its petition for appeal herein, to the United States Circuit Court of Appeals for the Ninth Circuit, together with its assignment of errors, and praying that an order be made fixing the amount of security which defendant should give and furnish on said appeal, and said petition and assignment of errors having been filed and presented within due time, and upon reading said petition and [152] assignment of errors, and the Court being advised,

It Is Ordered, that said appeal be and the same is hereby allowed to said plaintiff, and there is allowed to said plaintiff review in the United States Circuit Court of Appeals for the Ninth Circuit, of the decision herein, and the judgment heretofore rendered and entered in the above entitled action of the 2nd day of September, 1937, together with all actions, ruling and decisions of this Court duly excepted to and duly presented by bill of exceptions.

It Appearing to the Court that said plaintiff duly tendered herein on the 26th day of November, 1937, its costs bond in the sum of \$250.00 to the effect that said plaintiff and appellant shall prosecute said appeal with effect and, if it fails to make its plea and appeal good, shall answer all costs all as more particularly appears in the terms of said bond, which said bond is dated the 23rd day of November, 1937, and is made and signed by Fidelity and Deposit Company of Maryland, a corporation,

Now It Is Further Ordered that the amount of security which said plaintiff shall give and furnish upon said appeal shall be and is hereby fixed as the sum of \$250.00 to be secured by a good and sufficient costs bond to be approved by the Court, and that said costs bond heretofore duly tendered as aforesaid be and the same is hereby accepted and approved as such.

Dated: San Francisco, California, November 27th, 1937.

HAROLD LOUDERBACK

District Judge

[Endorsed]: Filed Nov. 27, 1937. [153]

[Title of District Court and Cause.]

STIPULATION RE BOND AND APPEAL

It Is Hereby Stipulated by and between the parties hereto that the Costs Bond tendered by plaintiff above named as and for the Costs Bond on an appeal which plaintiff proposes to take herein is satisfactory in form, may be approved by the Court, and may be filed for all purposes for which said bond may be used, and as an Appeal Costs Bond herein.

The above entitled Court may make its order accordingly.

Dated: November 24, 1937.

WILLIAMSON & WALLACE

Attorneys for plaintiff and
appellant.

McCUTCHEN, OLNEY,

MANNON & GREENE

Attorneys for defendant and
appellee.

[Endorsed]: Filed: Nov. 27, 1937, [154]

The Premium charged for this bond is \$10.00
Dollars per annum.

[Title of District Court and Cause.]

BOND ON APPEAL

Whereas, judgment was entered in the above entitled Court on September 2, 1937, that the Plaintiff take nothing by its action, and that the Defend-

ant have and recover its costs and disbursements as fully set forth in said judgment, and

Whereas, said Plaintiff is dissatisfied with said judgment and is desirous of appealing to the United States Circuit Court of Appeal for the Ninth Circuit, and

Whereas, it is necessary that said Plaintiff, El Dorado Terminal Company, a Corporation, file a cost bond in the sum of Two Hundred Fifty and No/100 (\$250.00) Dollars.

Now Therefore, in consideration of the premises, the undersigned Fidelity and Deposit Company of Maryland, a body corporate, duly incorporated under the laws of the State of Maryland and authorized to act as Surety, under the Act of Congress approved August 13, 1894, whose principal office is located at Baltimore, State of Maryland, does hereby undertake and promise on the part of El Dorado Terminal Company, a Corporation, that it will prosecute its said appeal to effect and answer all costs if it fail to make good its plea and appeal, not exceeding the sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, to which amount it acknowledges itself justly bound.

And further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the Court in the above entitled matter may, upon notice to the Fidelity and Deposit Company of Maryland, of, not less than ten days, proceed summarily in the action or suit in which the same was given to ascertain the amount which said Surety is bound to pay on account of

such breach, and render judgment therefor against it and award execution therefor.

Dated at San Francisco, California, this 23rd day of November A. D., 1937.

FIDELITY AND DEPOSIT

COMPANY OF MARYLAND

By **GUERTIN CARROLL**

Attorney-in-Fact

Copy

Attest:

C. A. BEVANS

Attesting Agent

Approved this 27th day of November, 1937.

HAROLD LOUDERBACK

District Judge

State of California,

City and County of San Francisco—ss:

On this 23rd day of November, A. D. 1937, before me, Ella Cook Kelly, a Notary Public in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared, Guertin Carroll, Attorney-in-Fact and C. A. Bevans, Agent, of the Fidelity and Deposit Company of Maryland, a corporation, known to me to be the persons who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same, and also known to me to be the persons whose names are subscribed to the within instrument as the Attorney-in-Fact and Agent respectively of said corporation, and they, and each

of them, acknowledged to me that they subscribed the name of said Fidelity and Deposit Company of Maryland thereto as principal and their own names as Attorney-in-Fact and Agent respectively.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year first above written.

[Seal]

ELLA COOK KELLY

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires Jan. 24, 1940.

[Endorsed]: Filed Nov. 27, 1937. [155]

[Title of District Court and Cause.]

**PRAECIPE FOR TRANSCRIPT OF RECORD
ON APPEAL**

To the Clerk of the Above Entitled Court:

Plaintiff and Appellant El Dorado Terminal Company hereby requests and directs you to prepare a transcript of record herein for use on the appeal of said plaintiff from the judgment herein and directs and requests you to include therein full, true and correct copies including file marks and endorsements of the following papers herein, prefixing [156] the same with a statement of the names and addresses of the attorneys of record herein, to-wit:

1. This Praecipe;
2. Plaintiff's Complaint as the same appears in the certified transcript of record on removal herein;

3. Order of Removal as the same appears in the certified transcript of record on removal herein;

4. Answer of defendant filed herein September 10, 1935;

5. Stipulation waiving jury filed herein January 27, 1936;

6. Findings of Fact and Conclusions of Law;

7. Judgment dated September 2, 1937 and entered on that day in your office at page 598 of Book 16 of Judgment Register, together with a showing of the date and place of entry of said judgment;

8. Bill of Exceptions of plaintiff and appellant El Dorado Terminal Company, a corporation, filed herein on the 18th day of March, 1937;

9. Assignment of errors of plaintiff and appellant El Dorado Terminal Company, filed herein on November 26, 1937;

10. Petition of plaintiff and appellant El Dorado Terminal Company for appeal filed herein on November 26, 1937;

11. Stipulation re bond and appeal filed herein November 27, 1937;

12. Bond on appeal filed herein November 27, 1937;

13. Order allowing appeal filed herein November 27, 1937;

14. Citation on appeal issued November 27, 1937, and filed herein November 30, 1937.

You will please forward to the Circuit Court of Appeals for the Ninth Circuit the transcript of

record on appeal herein, pursuant to the order settling the Bill of Exceptions.

WILLIAMSON & WALLACE

Attorneys for Plaintiff and
Appellant El Dorado Terminal
Company.

Receipt of a copy of the within Praecipe for transcript of record on appeal is hereby admitted this 18th day of March, 1937.

McCUTCHEN, OLNEY,

MANNON & GREENE.

[Endorsed]: Filed Mar. 19, 1938. [157]

[Title of District Court.]

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 157 pages, numbered from 1 to 157, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of El Dorado Terminal Company, a corporation vs. General American Tank Car Corporation, a corporation No. 19929-L, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$21.95 and that the said amount has been paid to me by the Attorneys for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 23rd day of March A. D. 1938.

[Seal]

WALTER B. MALING

Clerk.

B. E. O'HARA

Deputy Clerk. [158]

[Title of District Court and Cause.]

CITATION ON APPEAL

United States of America—ss:

The President of the United States of America to General American Tank Car Corporation, a corporation, Greeting:

You Are Hereby Cited and Admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, wherein El Dorado Terminal Company, a corporation, is plaintiff and appellant, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Harold Louderback,
United States District Judge for the Northern Dis-
trict of California, this 27th day of November,
A. D. 1937.

HAROLD LOUDERBACK

United States District Judge.

[159]

Service and Receipt of copy of the within Cita-
tion admitted this 29th day of November, 1937.

McCUTCHEN, OLNEY,

MANNON & GREENE,

Attorneys for Def't

[Endorsed]: Filed November 30, 1937.

[Endorsed]: No. 8799. United States Circuit
Court of Appeals for the Ninth Circuit. El Dorado
Terminal Company, a corporation, Appellant; vs.
General American Tank Car Corporation, a cor-
poration, Appellee. Transcript of Record. Upon
Appeal from the District Court of the United States
for the Northern District of California, Southern
Division.

Filed March 23, 1938.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 8799

EL DORADO TERMINAL COMPANY,

Appellant,

vs.

GENERAL AMERICAN TANK CAR CORPO-
RATION,

Appellee.

DESIGNATION OF PARTS OF RECORD TO
BE PRINTED

To Appellee Above Named and to Messrs. Mc-
Cutchen, Olney, Mannon & Greene, Its Attor-
neys, and to the Clerk of the Above Entitled
Court:

Pursuant to Section 8 of Rule 23 of the Rules of
the United States Circuit Court of Appeals for the
Ninth Circuit, El Dorado Terminal Company, ap-
pellant hereby makes and files its statement of
errors upon which it intends to rely and of the
parts of the record which it thinks is necessary for
the consideration thereof, as follows:

Appellant intends to rely upon each and every
error assigned in the Assignment of Errors herein,
contained in pages 92-151 incl. of the certified
transcript of record on file herein;

Appellant believes and so designates the part of
the record necessary for consideration of said
errors to be the whole transcript of record on file

herein *save and excepting* therefrom all of the following:

1. That part of the Bill of Exceptions found at page 45 of the certified transcript of record, being the opinion and decision of the Interstate Commerce Commission, No. 3887, Use of Privately Owned Refrigerator Cars, 201 I. C. C. 323, which opinion is attached to said page 45; and

2. That part of the Bill of Exceptions found in the certified transcript of record beginning at the 2nd line of page 75 and concluding with the 23rd line of page 80 of said transcript, being the Findings of Fact and Conclusions of Law of the court below which are also fully set forth at pages 27 to 33, inclusive of said certified transcript; and

3. That part of the Bill of Exceptions found in the certified transcript of record beginning at the 19th line of page 41 and concluding with the 22nd line of page 42 of the certified transcript of record, being a part of the Answer of Defendant (appellee herein) read by counsel for defendant (appellee herein) at the trial, said Answer being set out in full at pages 10 to 25 inclusive of said certified transcript.

Appellant requests the Clerk to omit from the printed record those parts of the certified transcript of record referred to hereinabove.

Dated: San Francisco, March 23, 1938.

WILLIAMSON & WALLACE
Attorneys for Appellant.

Receipt of a copy of the foregoing Designation of Parts of Record is admitted this 23rd day of March, 1938.

McCUTCHEN, OLNEY,
MANNON & GREENE

Attorneys for Appellee.

[Endorsed]: Filed March 24, 1938. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF ADDITIONAL PARTS OF
RECORD TO BE PRINTED

To Appellant above named and to Messrs. William-
son & Wallace, its Attorneys, and to the Clerk
of the above entitled Court:

Pursuant to Section 8 of Rule 23 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, General American Tank Car Corporation, appellee, hereby designates for printing additional parts of the certified transcript of record on file herein which appellee thinks material, viz.:

1. That part of the Bill of Exceptions found at page 45 of the certified transcript of record, being the opinion and decision of the Interstate Commerce Commission, No. 3887, Use of Privately Owned Refrigerator Cars, 201 I. C. C. 323, which opinion is attached to said page 45; and

2. That part of the Bill of Exceptions found in the certified transcript of record beginning at the 2nd line of page 75 and concluding with the 23rd

line of page 80 of said transcript, being the Findings of Fact and Conclusions of Law of the court below which are also fully set forth at pages 27 to 33 inclusive of said certified transcript; and

3. That part of the Bill of Exceptions found in the certified transcript of record beginning at the 19th line of page 41 and concluding with the 22nd line of page 42 of the certified transcript of record, being a part of the Answer of Defendant (appellee herein) read by counsel for defendant (appellee herein) at the trial, said Answer being set out in full at pages 10 to 25 inclusive of said certified transcript.

Appellee requests the Clerk to include in the printed record those parts of the certified transcript of record referred to hereinabove.

Dated at San Francisco, California, March 31, 1938.

WARREN OLNEY, JR.

ALLAN P. MATTHEW

JOHN O. MORAN

F. W. MIELKE

Attorneys for Appellee

Service of the within designation and receipt of a copy is hereby admitted this 31st day of March, 1938.

WILLIAMSON & WALLACE

Attorneys for Appellant

[Endorsed]: Filed March 31, 1938.



No. 8799

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EL DORADO TERMINAL COMPANY,
a corporation,

Appellant,

vs.

GENERAL AMERICAN TANK CAR CORPO-
RATION, a corporation,

Appellee.

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division.

PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, January
24, 1939.

Before: Denman, Mathews and Healy,
Circuit Judges.

ORDER OF SUBMISSION

Ordered appeal in above cause argued by Mr.
W. F. Williamson, counsel for appellant, and by
Mr. Allan P. Matthew, counsel for appellee, and
submitted to the court for consideration and de-
cision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday, March 17,
1939.

Before: Denman, Mathews and Healy,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINIONS
AND FILING AND RECORDING OF
JUDGMENT.

By direction of the Court, Ordered that the type-
written opinions this day rendered by this court in
above cause be forthwith filed by the clerk, and
that a judgment be filed and recorded in the min-
utes of this court in accordance with the opinions

[Title of Circuit Court of Appeals and Cause.]

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

OPINION

[Printers Note: Emphasis in this Opinion by the Court.]

Before: Denman, Mathews and Healy,
Circuit Judges.

Denman, Circuit Judge:

This is an appeal from a judgment denying to appellant, plaintiff below, recovery of moneys collected by the appellee, defendant below, as agent for appellant, from several interstate railways.

The case is at law, the jury was waived and the court based its judgment against appellant El Dorado Terminal Company, hereinafter referred to as the El Dorado Company, on special findings and its conclusions of law.

The El Dorado Oil Works, a corporation owning and operating a vegetable oil refining plant at Berkeley, California, entered into a leasing contract with the appellee General American Tank Car Corporation, hereinafter referred to as the Car Corporation. The Car Corporation leased to the El Dorado Oil Works for three years, from January 1, 1934, 50 specialized coiled tank cars for the carriage of the Oil Works' vegetable oil. The rental for the cars was payable monthly. In the neighbor-

hood of 99 percent of the Oil Works' product is so carried over one or another of three transcontinental railways, into interstate commerce from its Berkeley plant.

The lease was assigned by the Oil Works to the appellant El Dorado Company, the former's wholly owned subsidiary, which brought this suit.

The suit concerns the claimed obligation of the Car Corporation under the car leasing contract to pay over to the El Dorado Company moneys the Car Corporation, the El Dorado's collecting agent, collected from the railways. The moneys were paid by the railways pursuant to a mileage tariff rate, duly filed with the Interstate Commerce Commission, as compensation for supplying them with the specialized coiled tank cars for the carriage by them of the Oil Works' and appellant's vegetable oil. The carriers were not equipped with such cars and the supplying of them by the shipper for the tariff rate had been a practice recognized by the Interstate Commerce Commission for over a quarter of a century.

There is no question concerning the right of the El Dorado Company to sue for breach of the assigned contract and to recover if its view prevail as to the law and facts relative to the collection and payment of the tariff rates.

Under the terms of the contract the Car Corporation was to collect from the several interstate

carriers serving the El Dorado Company the 1½ cents per car mile of the filed tariff rate for supplying to them the tank cars and credit the collections to the El Dorado Company. For 5 months after January 1, 1934, the beginning of the term, the Car Corporation performed this collecting agency contract crediting the El Dorado Company with the collections and making monthly payment to the El Dorado Company of the balance thereof, after deducting the monthly rental of the car lease and certain repair charges.

After July 1, 1934, the Car Corporation declined to pay over any balance to the El Dorado Company. It continued to collect in full from the carriers the tariff mileage, but claimed that all the balance over its monthly rentals and charges, it could keep to its own use. It based its refusal on three contentions:

(1) That the Car Corporation and not the El Dorado Company was the supplier of the cars to the railways; (2) that the monthly rental charge constituted the sole cost to the El Dorado Company in supplying the cars to the railways; and (3) that any amount paid by the railways to the shipper supplying them cars to carry its own oil, above this claimed actual cost to the supplier, reduced the shipper's *transportation cost*, under the freight tariffs and, hence, that the payment by the Car Corporation to the El Dorado Company of the excess of car mileage tariff collections over rentals would

constitute a rebate under the Elkins Act.* We hold that the Car Corporation has sustained none of these contentions. The case is of novel impression and because of this and of a dictum of the Interstate Commerce Commission, we have given it extended consideration.

*Section One. * * * [It] shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to * * * [the Interstate Commerce Act] whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by * * * [the Interstate Commerce Act], or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor * * *

* * * * * Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act."

32 Stats. at Large, 847, 848;

34 Stats. at Large, 587, 588;

49 USCA §41 (1) and (2).

(1) The lease deprived the Car Corporation of the possession and control of the 50 cars for the three year term and the Car Corporation could not supply them to the railways. This is apparent from the terms of the lease. It required the El Dorado Company to take the cars into its possession and pay the rental for the full three year term whether or not they were used. The purpose of the lease is clear. It is to give to the El Dorado Company a supply of cars devoted solely to meeting its own business requirements. They thus became instantly available for the delivery of its oil to its customers on one or another of the three railways' lines or their connecting carriers. They could be distributed for the service of its future orders.

The Car Corporation had no choice in the railway to be served by any of the cars nor, if they were not used by the El Dorado Company, could the Car Corporation require them to be supplied to any railway for the service of any other shipper. There is no basis for the Car Corporation's claim that it can retain the excess of the mileage collections over rentals because it and not the El Dorado Company supplied the cars to the three railways.

(2) The monthly rentals did not establish the cost of the El Dorado Company in supplying the cars to the carriers, and the Car Corporation has not proved that that cost is less than the mileage earnings of the cars.

The Car Corporation assumes in its pleading of its affirmative defense that it would be a rebate to

pay over to the El Dorado Company any balance above the car rentals and repair charges, and hence a cringe which permits it to retain such balance; and the court assumes in its decision sustaining the claimed defense, that the monthly rentals constituted the total cost of the El Dorado Company in supplying the cars to the carriers.

The Car Corporation has not established that the cost of supplying the cars is less than the mileage earnings. The lease pleaded in the defense not only shows the contrary likelihood but that the rental cost itself is not determined by the monthly payments of \$27.50 for each car. In addition to the monthly rentals, the lease provided for a possible further rental to be paid the Car Corporation at the end of the three years. This additional amount was the excess of tariff rates collected by the Car Corporation from the carriers for the mileage of the empty cars over the mileage for the loaded cars while carrying the El Dorado Company's oil. The El Dorado's cost can be determined only by considering this future added rental.

In determining what constitutes a supplier's cost, the Interstate Commerce Commission has considered its experience with the supplied facilities for a period as long as 18 years. Mileage Allowances on Refrigerator Cars, 218 ICCR 359 and cases cited *infra*. With such a lease it would require a consideration of the El Dorado Company's rationally expected three year supply experience with-

the cars to ascertain its cost of supplying them to the railways, before it could be determined whether the supplying was profitable. This cost calculation would involve much more than the per car monthly rentals plus the additional rental at the end of the three years.

Since the El Dorado Company has possession of the cars, it must provide trackage facilities for their storage and switching. It has the current cost of their administration. It has the cost of clearing the cars, not a simple task when it is considered that any rust or foreign substance on the coils which wind through the oil or on the sides of the cars may spoil the sensitive vegetable product.

During the three years there exist possible liabilities under the lease which easily could wipe out any excess of mileage over rentals. The El Dorado Company must pay the Car Corporation for any damage or destruction to the cars while on its own or its customers' private tracks. The oil is both inflammable and explosive and the contents may destroy the cars; so also may a conflagration or a collision or other happenings on the private tracks. So also the lease places on the El Dorado Company the liability for injury to persons or property caused by the use of the cars. It is a matter of business judgment whether to insure against such risks, if insurance be obtainable.

Also before it can be determined whether the three year lease will create a cost less than the mileage earned by the leased cars, it must be con-

sidered whether the plant will remain in operation. The monthly rentals go on though a fire or earthquake or a strike makes it impossible to manufacture the oil for shipment in the cars. The supply of copra from the Philippines may cease or become so costly that it does not pay to operate. Tariffs on copra may stop profitable manufacture. The rental costs for supplying the cars for 18 months may be the total 36 month obligation under the lease.

The Car Corporation has not sustained its burden of proof that the payment of the balances of mileage collections would be more than the added cost and liabilities we have described and the judgment may be reversed on this ground alone. Whether under the new district court rules the complaint could be amended and a new trial had, we leave to the lower court, if the Supreme Court should not agree with our decision on the Car Corporation's third contention, which otherwise disposes of the case.

(3) The Elkins Act makes it a criminal offense for the railways to pay less than their established mileage rates for the cars supplied by the El Dorado Company. The mileage rates properly are based upon averages which assume that certain shippers-suppliers having lower costs will make a profit. Such profit does not constitute a rebate prohibited by the Act.

The Elkins Act was passed in 1903. Three years later, in 1906, Congress recognized that despite the command of the Interstate Commerce Act of 1887, the railways were not supplying to specialized industries such facilities as these coiled tank cars. In a statute increasing the penalties of the Elkins Act from a fine to from \$1,000 to \$20,000, to the fine plus, at the option of the sentencing judge, imprisonment for not more than two years,* Congress also specifically provided for the right of owners shipping goods interstate to supply their carriers with the facilities necessary to the transportation of their products.** That provision of 1906 was added to §15 of the Interstate Commerce Act of 1887. It was later amended in a manner not relevant and the language recognizing this shipper-supplier right now reads:

“§15, par. (13) Allowance for service or facilities furnished by shipper. If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the car-

*34 Stats. at Large, 584, 588.

**34 Stats. at Large, 590.

rier or carriers for the services so rendered or for the used [use] of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

49 USCA, Chap. 1, §15, par. (13).

The "just and reasonable" "charge and allowance" for providing carriers such instrumentalities as coal cars, log cars (bents), refrigerator cars, tank cars and the like, are required by the first paragraph of §6 of the Interstate Commerce Act, as amended in 1906, to be fixed and stated in their filed and published tariffs. The provision reads:

"§6, par. (1) Schedule of rates, fares, and charges: filing and posting. Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. * * * The schedules printed as aforesaid * * * shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the com-

mission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities, defined in this chapter."

49 USCA, Chap. I, §6, par. (1).

The word "transportation" for which this section requires the filing of rate schedules is defined in paragraph (3) of §1 (49 USCA §1 (3)) as including "locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

Hence, the "allowance" for the "service" of furnishing to carriers "transportation", i. e., tank cars, "irrespective of ownership or of any contract, express or implied, for the use thereof", which, under §15, par. (13) a shipper-supplier was permitted to render, is to be determined by "rates" which are to be "stated separately" in the schedules to be filed with the Commission and published by the carrier.

Uniformity of charges for carriers' services was one of the main objectives of the three regulatory acts. The evils of discrimination of one shipper over another had become so great that establishment and publication of uniform tariffs requiring the same charges to all for carriers' services is one of the primary requirements of the Interstate Commerce Act.

The Elkins Act in 1903 reinforced this compulsion for uniformity, by making it a crime for a carrier to deviate from its tariff schedules, and the Hepburn Act increased the penalty to a possible two years' imprisonment. The provision is:

*** Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereto, or participates in any rates so filed or published, that rate as against such carrier, its officers, or agents in any prosecution begun under this Act shall be conclusively deemed to

be the legal rate, *and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.*"

32 Stats. at Lg. 847, 848;

34 Stat. at Lg. 588;

49 USCA §41 (2).

Section 15 of the Interstate Commerce Act §6 recognizing the shippers' right to supply "instrumentalities" to his carrier, provided for a hearing by the Commission on complaint or its own motion to determine whether the rates for rendering any service or furnishing any instrumentality are "just and reasonable", with the power in the Commission to fix a "reasonable" "maximum" charge. 49 USCA §15, (13). When this reasonable maximum is fixed, the carriers file and publish in their schedules a rate of compensation, not more than the reasonable maximum fixed by the Commission.

It is obvious that this compensation by uniform rates to the shipper for supplying services to the carriers in aid of transportation of its own goods would in many cases yield a profit to certain shippers. Uniformity of rate is determined by the Commission, often by a computation of the average of the costs of many suppliers over a prior period of several years. *U. S. Cast Iron Pipe & Foundry Co. v. Director General*, 57 ICCR 677, 685; *Mileage Allowance on Refrigerator Cars*, 218 ICCR 359.

However, such individual economic advantage is inevitable if the Congressional intent of uniformity of charge by fixed rates, applicable to all suppliers, is to be attained. The Supreme Court, in an opinion by Mr. Justice Holmes, in reviewing cases in which the rate for supplying grain elevator facilities to the interstate carriers was reduced from $11\frac{1}{2}$ cents per 100 pounds to $\frac{3}{4}$ of a cent, stated: "The law does not attempt to equalize fortune, opportunities or abilities". *Interstate Commerce Comm. v. Diefenbaugh*, 222 U. S. 42, 46. See also same case below, *F. H. Peavey Co. v. Union Pac. Ry.*, 176 Fed: 409, 419, 420.

If the Car Corporation's contention were the law, instead of the required uniformity to all competing industries depending on and using interstate railways, every shipper-car-supplier would have to establish to his carrier for every car supplied, the exact cost to him before the carrier could pay him his compensation. Since, if the railway pay more, it is liable to at least a \$1,000 fine for its payment for each car or cars so used, with a maximum of a two year sentence, we may be sure the many thousands of annual negotiations between shippers and carriers would be most vigorously conducted. The wastage of time and economic effort would be enormous.

Apart from wastage of effort, it would greatly increase the opportunity for rebating and discrimination. The competitive carriers would be pressed to

come to the standard of the "most liberal estimator" of the supplier's cost. In these great industries requiring specialized types of cars, rebating would tend to become universal. Unless the carriers are compelled to supply such specialized tank cars and the shippers are allowed to supply them only in exceptional instances, it is not conceivable that Congress intended the Interstate Commerce Act and Elkins Act should be interpreted as contended by the Car Corporation.

The practice of furnishing private cars by shippers to their carriers after the Interstate Commerce Act was amended in 1906, was recognized in 1910 by the Interstate Commerce Commission in a decision involving the supplying of tank cars. The tariff rate shown then to have been established was $3\frac{1}{4}$ cent per car mile. *Procter and Gamble Co. v. Cincinnati H. & D. Ry. Co. et al*, 19 ICCR 556, 557, 560.

In 1917 Congress enacted more specific provisions controlling the practice. 40 Stat. 101. This legislation, amended in 1920, in respects not relevant, (41 Stat. 476, 477), adds to Section 1 of the Interstate Commerce Act the following paragraphs:

"(10) The term 'car service' in this Act shall include the use * * * of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, * * * by any carrier by railroad subject to this Act.

“(11) It shall be the duty of every carrier by railroad subject to this Act * * * to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

* * * * *

“(13) The [Interstate Commerce] Commission is hereby authorized by general or special orders to require all carriers by railroad subject to this Act, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this Act relating thereto.

“(14) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this Act, *including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it*, and the penalties or other sanctions for nonobservance of such rules, regulations or practices.”

MICRO CARD

TRADE MARK 

22

39



1170

65



In 1918, the Commission conducted a hearing under the provisions of the 1917 statute to determine, among other things, whether the then published tariffs for the supplying of tank cars should be increased.

The hearing involved a review of the whole question of the supplying of cars to carriers by shippers and the Commission found that the practice, then some 20 years old, drew its supply of cars from some 200,000 not owned by the railways. It decided that such supply by the shippers was advantageous to the movement of interstate commerce and that the method of compensating the shipper was by a uniform rate to be published in the carriers' tariffs, and ordered a continuance of the long established practice to file and publish such rates. It decided that the rates should be computed on the basis of mileage traveled by the shipper's car, both in the carriage of his goods and in the return of the empty cars. It made no provision for any deviation from the uniformity of this rate.

In the particular case of the claim of the shippers supplying leased cars, it held that they "may continue to lease cars to transport their shipments from sources independent of carriers by railroad". With regard to tank cars it held that the then mileage rate in the published tariffs, payable to the shipper, should be increased.

Pertinent portions of the Commission's decision are:

"When a shipper furnishes his own car for transportation of articles in common use and which move in large volume, he relieves the carrier of so much of its obligations as a common carrier. This is true whether the shipper furnishes the car as owner or lessee. Carriers recognize this and make allowances to the owner or controlling shipper, as before stated, for the use of such cars. The question here to be considered is as to the basis of the allowance or payment therefor. * * *

"The act of May 29, 1917, hereinbefore referred to, grants power to the Commission to fix the compensation to be paid for the use of any car not owned by the carrier.

* * * * *

"Under all the facts and circumstances shown of record, we [the Commission] find:

"1. That as the situation now exists, and under the circumstances and conditions shown of record, shippers may continue to lease cars to transport their shipments from sources independent of carriers by railroad.

* * * * *

"3. That payments should be made by carriers on the basis of the loaded and empty mileage, and that mileage should be computed on the basis of distance tables without the elimination of mileage through switching districts.

* * * * *

"5. That the present payment of $\frac{3}{4}$ cent on the loaded and empty movements for the use of tank cars of all kinds by all carriers by railroad should be increased to 1 cent per mile for the loaded and empty movements; * * *".

In the Matter of Private Cars, 50 I.C.C.R. 652, 680, 681, 709.

Here again it must have been obvious to the Commission that there would be many shippers who would be able to supply tank cars at less than the rate based upon the averages for all. Nevertheless, the Commission held "If private cars are used, they must be under an arrangement stated definitely in tariffs". (Id. 677).

It did so, recognizing that shippers leasing cars would have different rentals, one from another, and hence, that the rental may be profitably less than the tariff. The Commission states this with reference to tank cars for the transportation of cottonseed oil:

"Tank cars for transportation of cottonseed oil or other seasonable articles are, in the main, used by the owners to transport their own traffic, but they lease them at times when not in their own service for any price they can secure, which, of course, varies with different seasons and the needs of the lessees." (Id. 676).

And generally of all cars supplied by shippers:

"The allowance that shall be paid for the use of private cars under all the circumstances and conditions shown must be considered on the average. There can not be, with propriety, as many different rates of payment as there are owners with varying ability to efficiently handle the cars with respect to mileage earnings, repairs, and depreciation, nor can there be as many rates as there are different kinds and grades of privately-owned cars." Id. 683.

Once this average scheduled rate is established, a violation of its uniformity by paying a shipper-supplier of cars a less amount becomes a crime under paragraph (2) §1 of the Elkins Act.

Such averages have determined tank car supplying rates in subsequent cases. See Switching Rates in Chicago District (1931) 177 ICCR 669, 704, et seq.; Mileage Allowance on Refrigerator Cars (1936) 218 ICCR 359, 364, 365.

The Supreme Court recognizes the right to make such rate on a particular service by averaging on the experience of others rendering a similar service, and that its determination is primarily a matter for the Commission. *O'Keefe v. U. S.*, 240 U. S. 294, 302, 303. Cf. *Sprunt & Son v. U. S.*, 281 U. S. 249, 259, where a "level" rate was fixed by the Commission for all carriers.

Since the decision of *In the Matter of Private Cars*, supra, the Commission has raised the tariff

rate on tank cars to $1\frac{1}{2}$ cents per car mile traveled, both loaded and empty, and as noted, the Car Corporation's answer admits that the schedules of the three carriers to which the El Dorado Company supplied the cars were legally filed. Hence they are binding both on the El Dorado Company and the railway companies.

In *Paragon Refining Co. v. A. & S. R. R. Co.*, 118 ICCR, 166, 168, the shipper supplying the tank cars had been denied any payment, and the Commission awarded it 1 cent a car mile as its compensation for supplying to October 1, 1920, and ordered it be paid after October 13, 1926, $1\frac{1}{2}$ cents a mile, the later uniform rate.

Such rate uniformity must apply to all shippers. It does not mean that a tariff rate established for a shipper service by certain shippers, and not for other shippers rendering the same service, may not be held invalid for discrimination. This, however, is not a determination that the tariff compensation is not "just and reasonable" for the service rendered, but that it is invalid because it lacks the uniformity of including all shippers within its provisions. *Merchants Warehouse Co. v. U. S.*, 283 U. S. 501, 511.

Until the Commission determines that the established rate compensation for car supplying, based upon such averages, is not "just and reasonable" under §1, pars. (10) to (14) inclusive of the Interstate Commerce Act, we have no power to deter-

mine that it is not. The Supreme Court has held that the reasonableness is a matter of administrative discretion, and that the courts have not the power to pass on it.

"But where the suit is based upon unreasonable charges or unreasonable practices, there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the Commission and not the courts should pass upon that administrative question. When such order is made it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case,—thereby giving every shipper equal rights and preserving uniformity of practice. Section 9 gives the plaintiff the option of going before the Commission or the courts for damages occasioned by a violation of the statute. But since the Commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, the plaintiff must, as a condition to his right to succeed, produce an order from the Commission that the practice or the rate was thus unreasonable and therefore illegal and prohibited."

Mitchell Coal Co. v. Penna. R. R. Co., 230

U. S. 247, 257.

The Car Corporation offers no case arising in the 30 years since the 1906 amendment of §15 of the Act of 1887, recognizing the right of shippers to supply instrumentalities and facilities to their carriers, in which such a shipper-supplier has been prosecuted because he has accepted a tariff rate for his services in excess of its cost. If the Car Corporation's contention be correct, there must have been scores of thousands, if not hundreds of thousands, of such crimes—yet, no Commissioner, rival shipper, or competing community has persuaded a district attorney to attempt the conviction of any offender. Realizing the significance of such absence of cases, the Car Corporation offers the brief of a district attorney on a demurrer to an indictment, where it was claimed that the shipper was not in fact the supplier, and that the lease of the cars to it was a pretense and sham. The Car Corporation's pleading of the El Dorado lease shows it was neither, but a legitimate business transaction.

The Car Corporation cites the opinion of the circuit court in *I. C. C. v. Reichman*, 145 Fed. 235. This case was decided in 1906, shortly before the Hepburn amendment and 11 years before the war service amendment of 1917, under which the Commission fixed the scheduled rates for shippers supplying leased tank cars to their carriers. Though purporting to construe the Elkins Act, it does not consider its second paragraph, making criminal a carrier's deviation from such tariffs, perhaps be-

cause no such car supplying tariff was in existence.

In *U. S. v. Chicago and Alton Ry.*, (CCA-2) 156 Fed. 558, there was not only no tariff filed, and hence no reason to construe par. 2 of §1 of the Elkins Act, but the shipper was held not to have rendered any service to the railway. *Id.* 562. *Aff.* on a divided court, *Chicago and Alton Ry. v. U. S.*, 212 U. S. 563. Cf. *Inland Steel Co. v. U. S.*, 59 S. Ct. 415, 416, where the tariff allowance to shippers for spotting cars in shippers' yards was held not for a service to carrier; *Baltimore & O. R. Co. v. U. S.*, 59 S. Ct. 284, tariff charge for warehousing held not for a transportation service.

In none of the other authorities cited by the Car Corporation* and not considered above did a court have before it a case where the shipper of the goods exercised his privilege under §15, par. (13) of §1, pars. (13) and (14) of the Interstate Commerce Act, of supplying car service to his carrier. All were cases where the shipper supplying no service to the interstate carrier of the goods, received a rebate from the carrier, or from some third person supplying a facility in the interstate carriage.

The Car Corporation relies on a statement of the Commission in the Refrigerator Car case (*Use of Privately Owned Refrigerator Cars*, 201 ICCR 323) that

**Spencer Kellogg & Sons, Inc. v. U. S.*, (CCA-2) 20 Fed. (2d) 459; *U. S. v. Koenig Coal Co.*, 270 U. S. 512; *U. S. v. Michigan Portland Cement Co.*, 270 U. S. 521.

"A shipper, on the other hand, who owns no cars, but leases or otherwise obtains cars through a car line, whether privately owned or railroad controlled, under terms which place him in a more favorable position respecting the question of transportation than that *prescribed by the published tariffs* and occupied by shippers generally, is receiving an unlawful concession in violation of the Elkins Act. * * *

"We do not undertake to say that a carrier may not accept private cars if it so desires, but if such cars are accepted the carriers may not acquiesce in arrangements under which mileage earnings accruing to the car owner are paid in whole or in part by such car owner to the shipper lessee which results in the payment by such shipper of charges less than the published tariff rate," 201 ICCR 323, 378, 382, 383.

Section 15, par. (13) and §1, par. (14) make no distinction between shippers supplying leased cars from those they own. The Commission has recognized this in fixing the same tariff for both leased and owned cars. In the Matter of Private Cars, *supra*.

Since Section 1, par. (2) of the Elkins Act makes it a crime for the carrier to pay less than its published tariff, as here for tank cars supplied to it under §1, par. (14) of the Interstate Commerce Act, we are constrained to believe that the state-

ment of the Commission in the Refrigerator Car case contemplates a regulation by the Commission prohibiting the use of any tariff rates for supplying refrigerator cars. Their power to do this we are not called upon to decide.

The Commission confines the decision in the Refrigerator Car case to refrigerator cars, and expressly excludes tank cars from its regulation. The reasoning supporting the order on refrigerator cars may or may not be applied in a hearing in which are developed facts concerning tank cars similar to those in that case.

The Commission's power is exercised through its "orders"; "directions", "regulations", or "rules" made upon hearings on specified proposed subjects of regulation. Its reasoning in deciding the regulation of one matter pertaining to interstate transportation does not displace a tariff or rate or practice, recognized as controlling in an entirely different matter. The 1½ cents per car mile tariff for tank cars, recognized in the Paragon Refining case, *supra*, has not been set aside or declared as not "just and reasonable" by any action of the Commission. That tariff still controls the compensation for the supply of tank cars by shippers, whether owned by them, or, as here, held by them through a lease giving them control of their use.

The Car Corporation admits that it holds \$18,532.78 which it should have paid to the El Dorado Company in several monthly payments if its con-

tentions above stated are not sustained; and the El Dorado Company agrees as to the amount involved. Having established no ground for retaining these moneys from its principal and for keeping them for its own use, the Car Corporation owes the El Dorado Company this amount, together with interest computed on the several monthly balances making up the total.

Reversed.

Mathews, Circuit Judge:

This action was brought by appellant, El Dorado Terminal Company, a California corporation, against appellee, General American Tank Car Corporation, a West Virginia corporation, in a State court of California and, on appellee's petition, was thence removed to the District Court of the United States for the Northern District of California. Jury trial having been waived, the District Court tried the case, made and filed special findings of fact and conclusions of law, and thereupon entered judgment for appellee. From that judgment, this appeal is prosecuted.

The facts are not in dispute. They are, briefly stated, as follows:

Appellant is engaged in the business of producing, shipping and selling coconut oil. For the shipment of such oil by railroad, specially constructed tank cars are required. Common carriers by rail-

road are not required to, and often cannot, furnish such tank cars. Shippers of oil are permitted to, and often do, furnish tank cars for the transportation thereof. Such shippers may be either the owners or the lessees of such tank cars. Appellee is engaged in the business of owning tank cars and leasing them to shippers, who furnish them to carriers for the transportation of oil.

By a contract dated September 28, 1933, appellee leased certain tank cars to appellant,¹ at a specified rental per month, for a term of three years commencing January 1, 1934. The cars were to be and were furnished by appellant to common carriers for use by them in transporting appellant's oil by railroad in interstate commerce, and they were so used. By the contract, it was agreed that appellee would collect from the carriers all compensation² payable by them to appellant for the use of the leased cars, "according to and subject to all rules of the tariffs of the railroads," and would credit appellant's rental account each month with the amount thereof, and that, if such compensation

¹The contract was between appellee and El Dorado Oil Works, of which appellant is a wholly owned subsidiary. El Dorado Oil Works made the contract for appellant's benefit and, subsequently, with appellee's consent, assigned all its rights to appellant. For present purposes, therefore, the contract may be, and it is here, regarded as a contract between appellant and appellee.

²In the contract, this compensation was called mileage.

exceeded the rentals due, appellee would pay the excess to appellant. Thus, by the contract, appellee was made appellant's agent for the purpose of collecting the compensation mentioned and accounting therefor to appellant.

As such agent, appellee did, from January 1, 1934, to May 31, 1935, collect such compensation from the carriers and, from January 1, 1934, to June 30, 1934, did account therefor to appellant. That is to say, from January 1, 1934, to June 30, 1934, appellee credited appellant's rental account each month with the amount of compensation which appellee, as appellant's agent, had collected from the carriers and, as required by the contract, paid the excess to appellant. Thereafter, notwithstanding the contract, appellee retained all compensation collected by it and refused to pay appellant any part thereof. Between June 30, 1934, and May 31, 1935, the excess of such compensation over car rentals was \$18,532.78. To recover that amount, with interest, this action was brought.

Appellee defended on the ground that, although required by the contract, payment of the \$18,532.78 to appellant was prohibited by §1 of the Elkins Act, which provides: "[It] shall be unlawful for

The complaint prayed for \$21,131.04, but the trial court found that the excess of compensation over car rentals for the period mentioned was only \$18,532.78. This finding is not challenged by appellant.

any person, ~~persons~~, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to [the Interstate Commerce Act], whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by [the Interstate Commerce Act]; or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor * * *

Appellee stated in its answer, and here contends, that if it were to pay appellant any part of the compensation collected from the carriers in excess of the car rentals specified in the contract, such payment would be unlawful, in that appellant "would secure the transportation of property at rates less than the rates named in the published and filed tariffs of said common carriers applicable to such transportation, thereby obtaining a rebate or concession and an advantage or discrimination, in violation of the provisions of said Elkins Act."

This contention, which the trial court upheld, should be rejected. The carriers to which appellant furnished tank cars were and are subject to the Interstate Commerce Act. Paragraphs (10), (11),

(13), (14) and (17) of §1 of the Interstate Commerce Act⁵ provide:

“(10) The term ‘car service’ in this Act shall include the use * * * of locomotives, cars,⁶ and other vehicles used in the transportation of property, including special types of equipment, * * * by any carrier by railroad subject to this Act.”

“(11) It shall be the duty of every carrier by railroad subject to this Act * * * to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.”

“(13) The [Interstate Commerce] Commission is hereby authorized by general or special orders to require all carriers by railroad subject to this Act, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules⁷ showing rates, fares, and

⁵41 Stat. 476, 477, 49 U.S.C.A. §1.

⁶Including tank cars.

⁷Such as tank cars.

⁸In §1 of the Elkins Act, these schedules are called tariffs.

charges for transportation, and be subject to any or all of the provisions of this Act relating thereto.

“(14) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this Act, *including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it*, and the penalties or other sanctions for nonobservance of such rules, regulations or practices.”

“(17) The directions of the Commission as to car service * * * may be made through and by such agents or agencies as the Commission shall designate and appoint for that purpose. It shall be the duty of all carriers by railroad subject to this Act * * * to obey strictly and conform promptly to such orders or directions of the Commission, and in case of failure or refusal on the part of any carrier * * * to comply with any such order or direction such carrier * * * shall be liable to a penalty of not less than \$100 nor more than \$500 for each offense and \$50 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

* * *

Paragraph 1 of §6 of the Interstate Commerce Act⁹ provides:

"That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules¹⁰ showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad * * * when a through route and joint rate have been established. * * *

Paragraph (13) of §15 of the Interstate Commerce Act¹¹ provides:

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein,¹² the charge and allowance therefor shall be no more than is just and reasonable, and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so

⁹34 Stat. 586, 41 Stat. 483, 49 U.S.C.A. §6.

¹⁰These are the schedules referred to in paragraph (13) of §1 of the Interstate Commerce Act. In §1 of the Elkins Act, they are called tariffs.

¹¹36 Stat. 533, 41 Stat. 488, 49 U.S.C.A. §15.

¹²As, in this case, tank cars were furnished by appellant.

rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order. * * *

The carriers to which appellant furnished tank cars complied with the above quoted provisions of the Interstate Commerce Act. They had, long prior to the furnishing of such cars, established rules and regulations with respect to car service, as required by paragraph (11) of §1. They had published and filed with the Interstate Commerce Commission their schedules of rates, fares and charges (sometimes called tariffs), as required by paragraph (1) of §6. Their rules and regulations with respect to car service had been filed with the Commission and incorporated in their schedules, as directed by the Commission,¹³ pursuant to paragraph (13) of §1.

These rules and regulations prescribed the compensation to be paid by carriers to shippers for the use of tank cars. The prescribed compensation (three quarters of a cent per car mile) was increased to one cent per car mile by order of the Commission dated July 31, 1918. In the matter of Private Cars, 50 I.C.C. 652, 709. This was increased to 1½ cents per car mile by order of the Commission on or prior to October 13, 1926. *Paragon Refining Co. v. Alton & Southern Railroad*, 118 I.C.C. 166, 168. Thereafter and at all times here pertinent, the prescribed compensation for the use of tank cars was 1½ cents per car mile. This compensation

¹³*Procter & Gamble Co. v. Cincinnati, Hamilton & Dayton Ry. Co.*, 19 I.C.C. 556, 560.

has never been determined by the Commission to be unjust and unreasonable. By paragraph (14) of §1 and paragraph (13) of §15, *supra*, jurisdiction to make such determination is vested in the Commission, not in the courts. *Terminal Railroad Ass'n v. United States*, 266 U. S. 17, 30.

There never was any statute, rule, regulation, direction or order prohibiting the leasing of tank cars to shippers or the furnishing of leased tank cars by shippers to carriers, or prescribing for their use a compensation greater or less than, or different from, that prescribed for the use of other tank cars, or limiting such compensation to the amount of car rentals paid by such shipper-lessees.

An order thus limiting the compensation payable to shipper-lessees for the use of refrigerator cars was made by the Commission on July 2, 1934, but that order was and is, by its own terms, applicable to refrigerator cars only, and not to tank cars. The opinion¹⁴ which preceded the order contains a dictum to the effect that "the general principles enunciated [in the opinion] apply equally to all other types of private cars," but, obviously, that dictum was not and is not a rule, regulation, direction or order, within the meaning of paragraphs (14) and (17) of §1 or paragraph (13) of §15, *supra*. It, therefore, did not alter or in any way affect any rule or regulation with respect to tank cars.

¹⁴Use of Privately Owned Refrigerator Cars, 201 I.C.C. 323, 382.

Freight paid to the carriers on shipments by appellant was that prescribed in the filed and published tariffs. Compensation paid to appellee, as appellant's agent, for the use of tank cars furnished by appellant was that prescribed in the applicable rules and regulations, which, as we have seen, were part and parcel of the same tariffs. There is, therefore, no basis for the claim that payment of such compensation to appellant was or is prohibited by the Elkins Act.

The judgment should be reversed.

[Endorsed]: Opinions. Filed Mar. 17, 1939. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 8799

EL DORADO TERMINAL COMPANY,
a corporation,

Appellant,

vs.

GENERAL AMERICAN TANK CAR COM-
PANY, a corporation,

Appellee.

JUDGMENT

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of the appellant and against the appellee.

It Is Further Ordered and Adjudged by this Court that the appellant recover against the appellee for its costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered March 17, 1939.
Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday, May 19, 1939.

Before: Denman, Mathews and Healy,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION
AND CONCURRENCE UPON PETITION
FOR REHEARING, AND DENYING PE-
TITION.

By direction of the Court, Ordered that the type-written opinion and concurrence upon petition for rehearing be forthwith filed by the clerk.

Pursuant thereto, and upon consideration of the petition of appellee, filed April 15, 1939, and within time allowed therefor by rule of court, for a rehearing of above cause; together with supplemental authority, It Is Ordered that said petition for rehearing be, and hereby is denied.

[Title of Circuit Court of Appeals and Cause.]

OPINION

○ UPON PETITION FOR REHEARING.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

[Printers Note: Emphasis in this Opinion by the Court.]

Before: Denman, Mathews and Healy,
Circuit Judges.

Denman, Circuit Judge:

We do not agree with the contention of the Car Corporation's petition for rehearing concerning the importance of the ruling in this case. The power of the Interstate Commerce Commission is plenary. If it regards as no longer in the public interest the continuance of the failure of the railways to supply tank cars and the long established practice of shippers owning or leasing such cars at once to serve their own industries and the carriers, it can, inter

alia, order the carriers to supply the cars to the shippers. It is properly inferable from the petition that even now, over two years after the expiration date of the Car Corporation's lease, the carriers are not required to supply tank cars to the great industries which could not exist without their use.

The petition urges *inter alia* that there is no evidence of any cost to the El Dorado Company in supplying the tank cars to the three railways other than the rental charged by the Car Corporation and hence it must be held that this is the only cost for such supplying. This ignores the fact discussed under (2) of our opinion that the El Dorado Company sued upon the breach of a contract entirely valid as pleaded; that the Car Corporation's answer pleaded the contract in *haec verba*; and that on its face it is valid and enforceable. The petition admits that "It is undisputed that the Car Company was contractually obligated to credit the car mileage revenue to the El Dorado Company * * *".

The contractual obligation was, "Sixth: The First Party shall collect all mileage earned by the cars covered by this agreement and keep all records appertaining to their movements. Second party shall assist first party in following the movements of said cars by furnishing to the first party complete reports of the movements of cars, giving date, routing, and destination of each movement. The first party shall each month credit to the rental or service account of the second party all mileage

earned by said cars while in the service of second party according to and subject to all rules of the tariffs of the railroads."

It is admitted the cars, while in the "service" of the El Dorado Company "earned" the mileage which the Car Corporation collected from the railways. The five immediate and successive monthly payments by the Car Corporation to the El Dorado Company of the balances of these earnings over the lease charges and rentals is a mutual interpretation of the words "credit to the * * * account of" the El Dorado Company as creating a collectible and payable credit of any net balance in favor of the El Dorado Company. There is no merit in the suggestion, first made in the petition for rehearing and contrary to the assumptions of the Car Corporation's briefs and argument, that the suit is prematurely brought by the El Dorado Company because it was only the final balance at the end of the three years that was to be paid by the Car Corporation.

The Car Corporation then asserted an affirmative defense, namely, that the payment by it to the El Dorado Company of any mileage earnings in excess of the car rental of the lease would constitute a crime under the Elkins Act and hence it could retain the excess and need not perform its agreement to pay such excess to the El Dorado Company.

There is no presumption that a lessee of tank cars has no other cost in supplying them to the railways, and our analysis of the lease showed there

were necessarily such added costs which well could exceed the compensation paid by the railways. If the dictum of the Refrigerator Car case (Use of Privately owned Refrigerator Cars, 201 ICC, 323, 378, 382, 383) is to be interpreted as stating that a lessee of cars can have no other cost than his rentals under the lease, it obviously is wrong. We do not so interpret the dictum, for the Refrigerator Car case, at page 382, expressly recognizes that there may be other expenses than rentals.

Even if the applicable principle were that it would be unlawful for the Car Corporation to pay over to the El Dorado Company any amount in excess of the latter's cost of supplying the cars to the carriers, the Car Corporation's affirmative defense did not embody this principle, nor did the conclusions of law on which the district court based its judgment. The affirmative defense alleged: " * * * That if defendant were to credit or to pay over to the plaintiff * * * any part of the mileage payments received from said common carriers by defendant, as the owner of said cars, *in excess of the car hire or rental reserved in said agreement* [not in excess of costs], such credit and payment would be unlawful * * *".

The district court, in substance, reiterated this statement in its conclusions of law.

Thus, even under a principle that a shipper-lessee's compensation for car supplying may not exceed its costs, the affirmative defense was inade-

quate and the judgment of the district court was based on an erroneous conclusion of law.

Moreover, our opinion shows that even had the affirmative defense stated that costs of the shipper-lessee's car supplying were less than the mileage earnings, the Car Corporation has not maintained its burden of proof to establish it.

The petition attempts to counter the effect of the second paragraph of section 1 of the Elkins Act, making it a crime for a railway to pay less than a published rate for a car service, by asserting that it was considered in the case of *I. C. C. v. Reichmann*, 145 Fed. 235, 242. In this it is in error. That case quotes section 2 on another matter, but does not consider the carrier's obligation to pay the established rates as required by the second paragraph of section 1.

The discussion under (3) of our opinion assumes that the law requiring the filing of rates for car supplying in the industries using tank cars has been complied with and that there is a duly filed and published mileage tank car rate of $11\frac{1}{2}$ cents per mile as compensation to all shipper-suppliers for the use of tank cars supplied by them, recognized as filed with the Interstate Commerce Commission in *Paragon Refining Co. v. A. & S. R. R. Co.*, 118 ICC 166, 168. Since there could be a crime committed under the Elkins Act only if there were no rate filed with or established by the Commission providing for the payment of compensation for the

use of cars supplied by a lessee in the position of the El Dorado Company, the Car Corporation had the burden of proving that none was filed or established.

The Interstate Commerce Act requires the filing with or establishing by the Commission of such rates as are paid by the carriers for car supplying, the Elkins Act makes it a crime for the carriers to depart from such rates, e.g. to pay less, and the Car Corporation's answer admits that the mileage tariff payments were for the "use" of the cars in the El Dorado Company's service. The Car Corporation's answer does not allege the absence of a tariff compensating the El Dorado Company, and the court cannot take judicial notice of any of the thousands of tariff provisions filed with the Interstate Commerce Commission. Against the pleading seeking to establish a criminal act, we must assume that the applicable tariff is for the compensation of such a lessee-supplier as the El Dorado Company. Since the answer pleads no such defense, it does not support the judgment.

Even assuming a pleading that there is no tariff which provides a compensation to a lessee-supplier, nowhere in the record is there proof of the terms of the tank car mileage tariff rate showing that the money the Car Corporation seeks to hold were not payable to the El Dorado Company, or proof of the absence of any tariff compensating a shipper-supplier in the position of the El Dorado Company.

Since the burden of proving unlawfulness is on the Car Corporation, we assume the unproved rate is compensation to the lessee car supplier. There is no finding that there is an absence of such a tariff and hence the findings fail to support the judgment.

The record contains certain "rules" of the American Railway Association, providing for the payment by the carriers, often several intercommunicating lines, of the amounts of car mileage due for the tank cars which have been supplied for their hauling. These Association rules make the compensation provided by the mileage rates filed with the Commission payable on the marks of the car owners to such owners in certain cases regardless of whether the owners or their lessees actually supplied the service to the railways. Obviously, this is a matter of convenience, for the great car-owning companies may lease hundreds of single cars to lessees and an accounting by the railways to such individual lessees would create great cost and confusion.

These "rules" of the railways Association refer to, but do not quote, the mileage rate allowance filed with or established by the Commission, giving its designation as "Mileage Tariff No. 7-I, I. C. C. No. 2692". Assuming they were rules of the Commission, which at the same time permits the railways' tariffs to state they are not obligated to furnish tank cars, we cannot construct from them the terms of the mileage rate allowance filed with

the Commission to hold that the performance of the contract contained in the lease would constitute a crime under the Elkins Act.

Petition for rehearing denied.

Mathews, Circuit Judge, concurs in the result.

[Endorsed]: Opinion and Concurrence Upon Petition for Rehearing. Filed May 19, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Messrs. McCutchen, Olney, Mannon & Greene, counsel for the Appellee, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including June 30, 1939; and in the event the petition for a writ of certiorari to be made by the Appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

WILLIAM DENMAN

United States Circuit Judge

Dated: San Francisco, California, May 19, 1939.

[Endorsed]: Filed May 20, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing three hundred and forty-eight (348) pages, numbered from and including to and including 348, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 25th day of May, A. D. 1939.

[Seal]

PAUL P. O'BRIEN.

Clerk.



SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

(4836)

MICRO CARD

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